THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 4, 2008

Mr. John H. Sims
Deputy Minister of Justice
East Memorial Building, Room 4121
284 Wellington Street
Ottawa, ON K1A 0H8

Ms. Sheridan Scott
Commissioner of Competition
Competition Bureau
21st Floor, 50 Victoria Street
Gatineau, QC K1A 0C9

Dear Mr. Sims and Ms. Scott:

Re: Review of Section 11 of the Competition Act

I write to you in my capacity as Immediate Past Chair of the National Competition Law Section of the Canadian Bar Association (the CBA Section) concerning the opinion letter of Brian Gover dated June 19 and publicly released on August 12, 2008 in relation to section 11 of the *Competition Act* (the Report).

The CBA Section welcomes a number of the recommendations in the Report and the suggestion for a dialogue between the CBA Section and the Competition Bureau with regard to section 11 orders. We believe there is merit to the proposals that:

- the Bureau engage in pre-application and post-service dialogue with respondents of Section 11 orders,
- Section 11 orders not be sought in furtherance of a criminal inquiry against a person who is a suspect at the time of the application,
- Section 11 orders include language that allows the Commissioner some flexibility to "read down" the scope of production where the respondent's production of less information is sufficient, and
- counsel to the Commissioner personally attend all Section 11 order applications before the court.

We expect that the CBA Section will develop a detailed response to the Bureau regarding a number of positions, assertions and proposals that Mr. Gover sets out in the Report, some of which we regard as unfounded or controversial.

However, several aspects of the Report warrant an immediate response from the CBA Section. In our view, the Report is not independent and does not reflect meaningful consultation with either the private competition law bar or the Canadian business community. We elaborate on our concerns below.

Consultation with the CBA Section

The Report[1] states that Mr. Gover sought the input of the private bar in a meeting with me and the then-Past Chair of the CBA Section, James Musgrove. Following the announcement of Mr. Gover's appointment, the CBA Section on more than one occasion requested of both Mr. Gover and the Bureau an opportunity to participate in the process and clarification of Mr. Gover's mandate. Initially a Bureau representative indicated that she did not

[1] At 6.

expect Mr. Gover's review would be a consultative process. Mr. Gover eventually agreed to meet with us, in the presence of Adam Fanaki, Special Counsel to the Commissioner. The meeting took place on April 28, 2008 and lasted about an hour. We did not receive any detailed information about the intended scope of the Report prior to that meeting. We did not know that Mr. Gover would critique the decision of Federal Court Justice Mactavish in the *Labatt*[2] decision, propose amendments to the *Competition Act*, or superficially dismiss the private bar's serious concerns, which to some extent were validated by the Court in the *Labatt* decision (as discussed below). Accordingly, we were not in a position to provide input on those issues or allegations. We did take the opportunity to provide Mr. Gover with a general overview of the CBA Section's concerns about the section 11 order process and gave him a copy of the attached February 6, 2007 submission of the CBA Section in relation to the Commissioner's Information Bulletin on Section 11 Orders.

Misstatement of the CBA Section's Position

The Report seriously misstates the CBA Section's position when it claims that "the private competition law bar's main concern was leveled at the existence of a s. 11 power itself". That has never been the CBA Section's position. Our key concerns with regard to the section 11 order process are and remain: (1) the lack of prior notice in merger and other civil cases to a respondent of an application to the court for an order; and (2) the over breadth of many Section 11 orders. We still believe that the process can be improved in a manner that reduces the burden on Canadian businesses and enables the Bureau to effectively (perhaps even more effectively) enforce the *Competition Act*.

Criticism of the Private Bar

The Report states that "the private competition law bar will have to move away from its current adversarial approach towards a more co-operative model"[3]. The Report does not explain how the private bar has been inappropriately "adversarial" or uncooperative. Nor did Mr. Gover make any such suggestion during our April 28 meeting with him. As the CBA Section is identified in the Report as having represented the private bar, we disagree with this comment and find it inappropriate and unfair.

Critique of the Decision of Justice MacTavish

We were very surprised at the Report's critique of the *Labatt* case, in which Justice Mactavish set aside a section 11 order issued against Labatt because of deficiencies in the disclosure made by the Bureau in the application materials. Rather than advise on the appropriate process for the Bureau to follow with respect to section 11 orders in light of the existing case law, Mr. Gover argued that the *Labatt* case, among others, was wrongly decided. While Mr. Gover is entitled to his views, the following statement by Mr. Gover looks like an apologia for the Bureau's decision not to appeal:

> In our respectful view, the conclusions of the Federal Court in *Labatt* were not warranted and the Court erred in exercising its discretion to vacate the November 2007 s. 11 order. Nevertheless, the decision was a discretionary one and, as such, the prospects of overturning the decision at the Federal Court of Appeal were not favourable.[4]

We do not here express any position of the merits of the decision. Regardless, it was not appropriate to present such a critique in a report commissioned by the Commissioner and issued to the public. The Bureau should have appealed the decision if it disagreed with it. Public criticism by Government agencies of court decisions tends to undermine public confidence in our judicial system. Moreover, Mr. Gover's critique was not independent or balanced given that he met with members of the Commissioner's case team on the *Labatt* case and did not meet with counsel for Labatt.

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2 *Canada (Commissioner of Competition) v. Labatt Brewing Co.* 2008 FC 59.

3 At 5.

4 At 20.

Limited Consultation Outside of Government Representatives

Given the nature of some of the commentary in the Report, we were surprised at Mr. Gover's very limited consultation with the private bar and the complete absence of any consultation with the business community, such as Canadian businesses that have had to comply with section 11 orders. Accordingly, we do not understand the basis or reference point for the Report's key conclusion that the Bureau properly balances the burden on respondents against the need to obtain information necessary for the inquiry,[5] or the comments about the relative efficiency of respondents rather than the Bureau providing information already in the Bureau's possession.[6]

Proposed Amendments to the Competition Act

Given Mr. Gover's mandate, we were surprised to see in the Report a recommendation to amend the *Competition Act* to permit the Commissioner to issue mandatory document and information demands in the merger context. We expect that this proposal will be controversial and neither Mr. Gover nor the Bureau raised this prospect, or invited the CBA Section to comment on it, in the context of this Report. We also note that a similar proposal was recently made by the Competition Policy Review Panel, which also proposed that competition advocacy (presumably including advocacy of possible amendments to the *Competition Act*) be the responsibility of a new Canadian Competitiveness Council. If this recommendation is to be considered further, the CBA Section would be pleased to participate in any consultations on this issue with the appropriate body.

Conclusion

We would be pleased to meet with you to discuss these comments if that would be helpful. In any event, we look forward to a dialogue with the Bureau for continued improvement to the section 11 order process.

Yours truly,

(Original signed by Tamra Thomson for Barry Zalmanowitz)

Barry Zalmanowitz
Immediate Past Chair, National Competition Law Section

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cc: The Hon. Jim Prentice, P.C., M.P., *Minister of Industry*
Brian Gover, *Stockwoods*

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5 At 3.

6 At 39.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

February 6, 2007

Ms. Sheridan Scott
Commissioner of Competition
50 Victoria Street
Gatineau (Quebec) K1A 0C9

RE: Information Bulletin on Section 11 of the *Competition Act*

Dear Ms. Scott:

In November 2005, the Competition Bureau issued an Information Bulletin on Section 11 of the *Competition Act* (the Bulletin). The National Competition Law Section of the Canadian Bar Association (the CBA Section) supports the efforts of the Bureau in publishing guidance on the application of the *Competition Act*, as it increases the transparency and predictability of its interpretation and enforcement of the Act. Since the Bulletin was released without public consultation, the CBA Section would like to provide you with some comments on the Bulletin. We hope that the CBA Section's comments may be of some benefit to the Bureau in identifying areas for possible improvement in subsequent iterations.

The Bureau's past resort to section 11 has not been without controversy. In view of the significant burden placed on recipients of a section 11 order, stakeholders have significant concerns about the circumstances in which these orders are secured, the scope of the information requested in the orders, and, at times, the execution of the orders. Though the Bulletin provides a useful guide to the Bureau's thinking on some aspects of the section 11 process, broad formal public consultation prior to issuance might have been helpful, and should be considered with respect to any subsequent versions of the Bulleting.

I. Overview of Section 11

The Bulletin notes that, pursuant to a section 11 order, a Canadian corporation may be required to produce records in the possession of the corporation or its "international affiliates" when the issuing judge is satisfied that an affiliate has records relevant to the inquiry. At a minimum, the Bulletin should properly reflect the language of section 11(2). The ability of the Bureau to use its compulsory powers to access records in the possession of affiliates located outside of Canada is controversial. The Bulletin could have clarified the circumstances in which the Commissioner has

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sought and will seek an extraterritorial section 11(2) order, and how this would be consistent with applicable principles of extraterritoriality and other instruments, such as MLATs. In light of the difficult issues that arise from section 11(2), including the disparity between different jurisdictions' protection of solicitor-client privilege and of the privilege against self-incrimination, it is important for the Bureau to set out the factors it will take into account in choosing to exercise its authority under this subsection.

II. Requirements

While it is true that a court does not have the ability to conduct a full-fledged review of the Commissioner's decision to commence an inquiry under Section 10, as stated at page 6 of the Bulletin, this statement may inappropriately convey the impression that the court can only be a rubber stamp.[1] Since section 11 provides that a court "may" issue an order, the Bulletin should reflect the fact that the court has discretion whether or not to issue the requested order, having regard to all the circumstances.

It would be helpful to include a statement to the effect that it is the Commissioner's policy to place before the court all information that can reasonably be considered relevant to the court's consideration of the question of whether it is appropriate to issue an order in the circumstances, especially if the application is made *ex parte*.

III. Ex Parte Nature

Section 11(1) allows the Commissioner to apply *ex parte* for a section 11 order, but does not require it. There are circumstances in which notice to the Respondent is appropriate, including situations where the respondent is aware of the Bureau's investigation, as in cases where section 11 is invoked in merger investigations, where investigative measures have been undertaken in other jurisdictions, or in other circumstances where destruction of records is unlikely. In the CBA Section's view the bias should always be in favour of giving notice where doing so would not impair the integrity of the investigation. In such circumstances, it would be entirely appropriate for the court to hear from the respondent at the outset as to the relevance of the request and the burden that the order would place on such person, instead of imposing on the respondent the additional onus of applying to the court for a variation of the order after it has been issued in order to make such representations. This would particularly be the case where the respondent is prepared to cooperate with the Bureau, such as in the context of a merger review.

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[1] See *Canada (Commissioner of Competition) v. Air Canada* (2000), 8 C.P.R. (4th) 372, in which Madam Justice Reed stated that the issuing judge has an obligation to test the material to some extent:

> "I cannot conclude that Section 11 authorizes the issuing of an order to produce information if the [Commissioner] were acting on a "whim". … [The judge] is likely to require some description of the nature of the alleged conduct that is the subject of the inquiry, the basis of the Commissioner's decision to commence an inquiry and his reason for believing that conduct to which the inquiry is addressed has occurred. Also, the judge must be satisfied that the person against whom the order is sought is likely to have relevant information. This does not mean that the Court second-guesses the Commissioner's decision that he has reason to believe that the conduct that is the subject of the inquiry in question occurred, but it does allow the Court to refuse to grant an order where there is insufficient evidence to support a conclusion that a bona fide inquiry has been commenced."

IV. Venue of Application

In many inquiries under the reviewable provisions of the Act, the Bureau will already be in contact with the respondents of the inquiry. Where third parties are involved, it is also hoped that the Bureau would communicate with them before seeking an order about the scope of a request for production. As a result, there is no reason why the Bureau would not discuss a mutually convenient venue with a proposed respondent to an order. This is particularly relevant where a responding party may seek to invoke the provisions of section 19 respecting claims of solicitor-client privilege.

V. Service of Section 11 Orders

The statement that service of section 11 orders will always be made "in compliance with the requirements of the issuing court" is too vague to convey practical meaning. First, it is assumed that the Commissioner complies with the rules of Canadian courts. Second, some courts (such as the Quebec Superior Court) do not have express rules dealing with service of court orders.

In the view of the CBA Section, the policy should be that a section 11 order directed at an individual will be personally served. When the respondent is a corporation, service should be made personally to a senior officer or other person in charge, in accordance with the Court rules in the jurisdiction. In both cases, if counsel has been retained and is willing to accept service on behalf of the client, arrangements to that effect should be made. In the experience of CBA Section members, the Bureau merely obtains leave from the court to serve the order by facsimile. When a corporation is unaware of the ongoing inquiry, it may take several days before appropriate corporate officers become aware of the nature of the faxed document. Since the time frame to comply with a section 11 order is often short, precious time is unnecessarily wasted. In many cases, personal service on a responsible person would avoid this difficulty.

On a separate note, the CBA Section believes that service of orders should be prompt and timelines for response should not be unrealistically constructed. The CBA Section has also noted problems with service just before weekends and holidays, and other issues affecting parties' ability to respond as quickly and efficiently as possible. The practice in other jurisdictions, and certainly the practice of the U.S. Department of Justice, is to agree with parties on a reasonable schedule for compliance with Grand Jury subpoenas, in circumstances similar to section 11 orders. The practice of the Bureau has been less flexible. The CBA Section urges a less rigid approach, to avoid the unnecessary delay and expense generated by applications for extension of time or for clarification of the terms of an order that has been obtained *ex parte*.

Finally, in our view, it would be more appropriate for the due date of documentary production to be measured from the date of service rather than the date of the order in the event that there is, for some reason, a delay between issuance and service.

VI. Attendance at Examinations

Section 12(4) of the Act allows any person whose conduct is being inquired into to attend, with counsel, an examination held under section 11(1)(a). In addition to being served on the Respondent, all orders issued pursuant to section 11(1)(a) should therefore be served on any person whose conduct is being inquired into, to enable them to exercise their section 12(4) right.

The Bulletin states that, where the Commissioner seeks an order for oral examination of a third party under section 11(1)(a), the Bureau will not provide notice to the subject of the inquiry where it "concludes that the provision of such notice would compromise the integrity of the inquiry" and that even where notice is provided, that it will often request exclusion of the subject of the inquiry from the examination.

This position is inconsistent with the Act. Section 12(4) states that any person whose conduct is being inquired into at an examination is entitled to attend unless the Bureau or the person being examined (or the person's employer) establishes to the satisfaction of the presiding officer that their presence would (a) be prejudicial to the effective conduct of the examination or inquiry or (b) result in the disclosure of confidential commercial information relating to the business of the person being examined or their employer.

The only statutory basis for exclusion is in one of these situations. The Bureau is not entitled to exercise powers expressly granted to the presiding officer, i.e. to decide that the conditions in section 12(4) have been met. Withholding notice, as contemplated in the Bulletin, would in most cases effectively preclude the exercise of the right granted by section 12(4). The Act makes clear, at least by implication, that the Bureau should always provide notice and, if there is a concern, satisfy the presiding officer that the tests set out in section 12(4) have been met. In the view of the CBA Section it is inappropriate to deprive parties of their rights under the Act through indirect means, and a refusal to provide notice in such cases would have that effect.

VII. Fulfilling the Order

The general statement at page 7 to the effect that the Bureau will not negotiate the contents of a section 11 order that had been issued by the court seems to be an unreasonably strict rule, especially in cases where the order is significantly burdensome.

Further, this statement seems at odds with the next two sentences, which provide that "written advice" from the Bureau or its counsel is sufficient to clarify the contents of an order. This seems to imply that a written communication from the Bureau would be sufficient to vary – or at least to more precisely delineate – the court order. The process under section 11 should be sufficiently flexible to allow for written communication from the Bureau to vary the order. For example, in the context of a merger review, the order may be unduly burdensome for both the respondents and the Bureau, depending on the structure of the organizations in question. Maintaining flexibility in the process is key to facilitating an expeditious merger review, where cooperation is typically forthcoming.

Unnecessarily broad orders and unclear terms could be avoided by prior consultation with the respondent's counsel where consultation would not prejudice the investigation.

In connection with the due date for records to be provided, the Bulletin should recognize that respondents need appropriate time to respond to the order, depending on the nature of the request, and whether they are targets of an inquiry or a third party. In both cases, it should be acknowledged that where records may be located abroad, much more time is typically needed to respond effectively. Fixing a standard time, such as 30 days, and then requiring the respondent to apply for an extension of time is not appropriate or reasonable in all cases. For instance, the Bulletin should state that except in exceptional circumstances, the Commissioner will

accommodate legitimate requests for extensions of time, considering that such requests are generally considered favourably by the courts, and indeed, in practice by the Bureau as well.

Draft orders should also allow the respondent to produce the records at a later date with the Commissioner's consent. A similar provision could be inserted with respect to postponing the date of oral examinations. This would again avoid imposing on the respondent the burden of applying to the court for a variation where the Commissioner consents to an extension of time.

The phrase used in the Bulletin "procedures for responding to the order" should be expanded upon. Presumably, it refers to practical matters such as the format of electronic records, certification of true copies, and coding of documents, but these should be specified. The Bulletin should also address the requirements for coding documents, which have proven extremely burdensome to respondents in many cases.

Some but not all recent section 11 orders have provided that the parties need not provide additional copies of material previously been provided to the Bureau. In our view, this should be consistent practice which the Bulletin should reflect, as it is unnecessarily burdensome on parties to provide documents to the Bureau on multiple occasions.

VIII. Application for the Variation of Section 11 Orders

While the issuance of section 11 orders is ultimately controlled by the courts, the content of the order is largely determined by the Commissioner's application. This portion of the Bulletin should refer to the prospect of the Bureau's consent to amend the order where the respondent is able to convince the Commissioner that requested information is either irrelevant or unnecessary. This may be particularly relevant for third parties who are not targets of an investigation, yet may be substantially impacted by the broad scope of a particular order and the significant resources required to comply with it.

IX. Role of the Presiding Officer During Examinations

This section should state the Bureau's general approach to seeking exclusion orders under section 12(4). It would be useful to know the circumstances in which the Bureau will and will not attempt to have persons excluded from the examination.

X. When the Bureau Will Seek an Order

The anecdotal experience of many members of the CBA Section is that the use of section 11 orders has become more frequent in the civil context, particularly in merger cases. The use of section 11 orders in merger cases is particularly problematic. As parties to a merger transaction are typically already providing information voluntarily, resort to the section 11 *ex parte* process (with attendant timelines for response) in such circumstances could be counterproductive, unless the Bureau has reason to believe that the party is not acting in good faith.

On the other hand, the Bureau has chosen not to resort to formal investigation powers under section 11 in recent investigations under the criminal provisions of the Act. Bureau management has publicly expressed a preference for resort to other compulsory powers (such as search warrants) as opposed to a voluntary approach, though there will still be some situations where a consensual approach remains appropriate. The CBA Section notes several recent criminal

investigations in which the Bureau has not invoked either warrants or section 11 orders. It would be helpful if the Bulletin clarified the situations in which the Bureau would seek a section 11 order, as opposed to requesting voluntary production. If these differ depending on the civil or criminal context, guidance in this regard would also be helpful.

XI. Sealing

The Bulletin should specify under which statutory provisions sealing orders are sought for applications made under section 11.

The Bulletin should be revised to take into account more recent jurisprudence on the sealing of documents related to investigative processes,[2] particularly the need for specified grounds upon which a sealing order may be sought.

The Bulletin states that the Bureau will normally request that the court records be sealed and remain sealed until criminal charges are laid or an application is made to the Tribunal. The stated reason for this is "to protect the integrity of the inquiry, the requirement under section 10 of the Act to conduct inquiries in private, and to comply with strict confidentiality provisions outlined in section 29 of the Act".

In *Toronto Star Newspapers Ltd.*, the Supreme Court of Canada stated that "a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficiency".[3] Following this reasoning, sealing orders are to be the exception rather than the rule and particularised reasons for seeking a sealing order in any individual case would be required. It would be desirable to understand the Bureau's views on when sealing orders can properly be justified.

Given that a number of section 11 orders have been obtained without sealing orders, it may be that the Bureau's policy has changed in this regard. If so, the Bulletin should be revised accordingly.

XII. Protection

The Bulletin refers to the regime for assertion of solicitor-client privilege pursuant to section 19. The experience of many CBA Section members is that the Bureau is often willing to deal with privilege claims in a consensual manner not contemplated in section 19, which some members have found useful. This informal type of review process can narrow down or eliminate documents over which there may be a privilege dispute, thereby avoiding unnecessary demands on the court. The Section strongly supports such an approach. To the extent that this is still the case, the Bulletin could usefully describe possible alternative approaches and the circumstances in which they may be appropriate. For example, the Bulletin could specify that, where the Commissioner does not dispute the privilege claim, no motion needs to be made and the documents will be returned if they have been placed in a sealed package. The Bulletin could also refer to the Bureau's current practice of less formal resolution of privilege claims, i.e. by agreement among counsel or by having a mutually agreed counsel rule on the validity of the claims, without implying any waiver of the

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2 *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188; *National Post Co. v. Ontario* (2003), 176 C.C.C. (3d) 432 (Ont. S.C.J.).

3 *Toronto Star Newspapers Ltd.*, *supra*, at para. 9.

privilege or prejudice to the claimant's rights to pursue formal resolution if these means prove unproductive.

With respect to the process for claiming solicitor-client privilege, the Bulletin should specify that once the relevant documents are placed in a sealed package, the respondent has 30 days to make a motion to the court, failing which the documents will be delivered to the Commissioner on an *ex parte* application. This would more appropriately describe the process established by the *Act* and put respondents on notice that they may lose their privilege claims if they fail to act quickly.

XIII. Care and Access

This part should state that, pursuant to section 20 of the *Act*, any copies of documents produced pursuant to a section 11 order are admissible in evidence in any proceedings and have the same probative force as the original.

The Bulletin should indicate what happens to the copies when the inquiry is closed. Under the former provisions, originals had to be returned to the person responding to the order within a certain time, unless the records were necessary for legal proceedings. Under the current provisions, the originals are returned, but the Bureau retains copies of the records, usually on CD-ROMs. The Bulletin should provide that these CD-ROMs will be destroyed or returned to the respondent once the inquiry is terminated, as they are no longer needed in the context of the inquiry for which they were produced. At the very least, the Bureau should specify what its document retention and destruction policy is in circumstances of section 11 inquiry terminations.

The CBA Section would be pleased to meet with the Bureau to discuss these comments or any other aspects of the Bureau's section 11 order policy and practice.

Yours truly,

(Original signed by Tamra Thomson for James Musgrove)

James Musgrove
Chair, National Competition Law Section