THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Draft Information Bulletin on Sentencing and Leniency in Cartel Cases

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

JULY 2008

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 as a public statement of the National Competition Law Section of the Canadian Bar Association.

Draft Information Bulletin on Sentencing and Leniency in Cartel Cases

I. INTRODUCTORY COMMENTS

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on the *Draft Information Bulletin on Sentencing and Leniency in Cartel Cases* (the Draft Bulletin) issued by the Competition Bureau on April 28, 2008.

The CBA Section appreciates the Bureau's efforts to consult with stakeholders on the Draft Bulletin and commends the proposal of a formal Leniency Program to complement the Bureau's existing Immunity Program.

The comments of the CBA Section reflect the unique perspective of its members, who regularly represent clients faced with criminal competition proceedings and concerns. From this background, the CBA Section hopes its comments will assist in fine-tuning elements in the Draft Bulletin to create an attractive and useful program that is a meaningful alternative to protracted litigation in appropriate cases.

A key consideration underpinning many of our comments is the need for predictability and transparency in the sentencing process. Defence lawyers must have the confidence that leniency considerations proffered by the Bureau in exchange for cooperation and guilty pleas face little risk of being rejected by other law enforcement actors. A key recommendation flowing from this consideration is ensuring that the Director of Public Prosecutions (DPP), as the official responsible for prosecuting offences and therefore making sentencing submissions on behalf of the Crown, specifically endorses the Bureau's leniency program.

The Draft Bulletin considers two separate topics – the proposed leniency program and principles of sentencing. In the CBA Section's view, the principles of sentencing expressed

in the Draft Bulletin should apply to all matters investigated by the Bureau for which the Bureau recommends prosecution to the DPP. To create the predictability and certainty that should be the hallmarks of a process to determine potential outcomes where offending conduct has been discovered, it would be preferable that the sentencing principles in the Draft Bulletin apply to all circumstances.

It would also be of assistance to include the immunity program and the leniency program in one document, rather than including sentencing principles in the same document as leniency.

II. INTRODUCTION TO THE DRAFT BULLETIN

(i) Role of the Commissioner, DPP and Courts

Unlike the United States where the investigative and prosecutorial agencies are one and the same, in Canada these functions are bifurcated. The DPP has sole authority to engage in plea and sentencing discussions with counsel for an accused. The Bureau may only make sentencing and leniency recommendations to the DPP which has independent discretion to accept or reject those recommendations.

In light of the prosecutorial discretion in the Canadian system, the CBA Section strongly recommends that the Bureau seek from the DPP a statement of recognition and support for the Leniency Program. While we agree with the Commissioner that parties are more likely to come forward and cooperate (rather than litigate) where they are aware of sentencing principles and leniency considerations, the CBA Section believes that the parties must be confident that the Bureau will follow those principles and considerations in its recommendations to the DPP, and that those recommendations will be accepted by the DPP.

The DPP recognizes the benefits of plea arrangements and would be expected to have no difficulty with the concepts expressed in the Draft Bulletin. Therefore, the CBA Section recommends that Chapter 20 of the Federal Prosecution Service Deskbook (the Deskbook), which addresses plea and sentence discussions, include a statement of support for the Bureau's Leniency Program. This statement is consistent with the principles that generally

inform Crown counsel's approach to sentence negotiations and the practice of the DPP, as reflected in footnote 12 of Chapter 20 of the Deskbook.

III. SENTENCING IN CARTEL OFFENCES

In this part of the Draft Bulletin, the Bureau attempts to contextualize its approach on the sentencing regime proposed for cartel offences. The Draft Bulletin makes helpful references to the many of the statutory guideposts for sentencing in criminal cases, as set out in the *Criminal Code*.[1] Additional principles of sentencing and guidelines from case law should be considered by the Bureau and referenced in the Draft Bulletin in approaching these issues.

(i) Economic Harm

Though the CBA Section agrees that, in some cases, cartel activity results in economic harm, we question the appropriateness of describing the "overcharge" as "the basis for the Bureau's sentencing recommendations", implying a level of scientific precision which does not exist in the real world. As an example, paragraph 32 refers to numerous studies that estimate the amount of an overcharge at "at least 10 per cent". No reference supports this statement.

If the goal in sentencing is to measure the economic harm flowing from cartel activity, then using 20% as a proxy for economic harm is arbitrary and unfair. The selection of 20% as the appropriate measure for a criminal fine for cartel offences is presumably based on the approach used in the U.S. However, that approach has been subject to criticism, including by the Antitrust Modernization Commission[2] and the American Bar Association Section of Antitrust Law.[3] The AMC recommended reevaluating the 20% proxy and amending the U.S. Sentencing Guidelines to make the 20% a rebuttable presumption (on a preponderance of the evidence) to be met by evidence which establishes that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.

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[1] R.S.C. 1985, c. C-46, as amended.

[2] Antitrust Modernization Commission Report and Recommendation (April 2007) 19,200-01.

[3] Comments of the ABA Section of Antitrust Law in Response to the Antitrust Modernization Commission's Request for Public Comment on Criminal Remedies, November 14, 2005 (available at http://www.abanet.org/antitrust/at-comments/2005/11-05/criminalremedies-comm.html).

Given the U.S experience with a 20% proxy, and considering Canadian sentencing principles of proportionality and totality, the CBA Section does not believe that the 20% proxy approach creates a fair and legally tenable method for fining cartel behaviour. If the objective is to fine based on economic harm, there should be a demonstrable basis (proven beyond a reasonable doubt) for establishing the harm, not an arbitrary and automatic use of 20%. In the CBA Section's view, the statements in the Draft Bulletin that the fictional percentage actually represents a demonstrable indicator of "economic harm" are unfounded and undermine the credibility of the Bureau's approach.

Paragraph 34 states that the Bureau would not submit a fine recommendation of less than 10% of the affected volume of commerce. This would create a minimum sentence for organizations involved in cartel activity, for which no justification is articulated by the Bureau. To be consistent with the stated goal of basing a fine on the economic harm associated with the cartel activity, a cartel which results in a 1% overcharge should be fined with that economic harm in mind, not a minimum sentence of a 10% overcharge. Further, economic harm is not an element of the offence in section 45 of the Act. While it may be unlikely that proceedings would be commenced or a conviction obtained in the absence of economic harm, given that harm is not an element of the offence, it is inappropriate to establish any percentage of volume of commerce as a minimum fine in all cases.

In measuring the "affected volume of commerce", paragraph 31 of the Draft Bulletin is problematic, in the CBA Section's view. This paragraph refers to "indirect sales" as a measure "to properly reflect the magnitude of the effects of the offence in Canada". The Bureau provides no guidance on the principles that would govern the use of "indirect commerce" as a basis for levying a criminal fine. The CBA Section believes that a number of questions must be answered before the Bureau could consider applying indirect commerce as the basis of a criminal fine: Which indirect commerce? To which consumers? In respect of which product(s) – the allegedly price-fixed product, or the product(s) into which that product was incorporated? How will there be an accounting for how the intermediary purchaser of the allegedly price-fixed product subsequently priced that product? Was the overcharge passed on to customers in Canada? In whole or in part? If in part, how much was passed on? How would that be taken into account in determining a

sentence based on indirect commerce? What were the supply and demand characteristics at each stage of the relevant chains of distribution which would inform whether there was an overcharge and whether it was passed on to Canadians in the form of indirect commerce? These questions often cannot be answered in any meaningful fashion, underlining the insurmountable difficulties with the concept.

Basing a fine on indirect commerce is inconsistent with the approach of the U.S. Department of Justice. The U.S. DOJ bases fines for cartel activity on the affected volume of commerce in that jurisdiction. Given the flow of commerce between Canada and the U.S., commerce that is "indirect" in Canada is frequently "direct" in the U.S., and in the case of cartel activity, will have formed the basis for a fine in the U.S. The principles of comity and recognition of jurisdictional boundaries, which have recently been given expression in worldwide cartel investigations, suggest that an approach which results in "double-counting" should be avoided. Fines that take into account indirect commerce will always result in double-counting and would be inconsistent with efforts by antitrust enforcement authorities in other jurisdictions to avoid that result.

The principle of totality should also inform the approach to obtaining large fines through the use of multiple counts in an indictment. As the Bureau notes, "…where appropriate on the facts, an accused may face multiple charges under the Act." However, this should not be simply a matter of arithmetic: a sentence must be just and appropriate. Where the total fine imposed through consecutive multiple-count penalties would be excessive for the overall level of culpability for the party, the principle of totality mandates that it be reduced.[4] As put by the English Court of Appeal, the final duty of the sentencing court where consecutive penalties are imposed is to ensure that the totality of the final sentence is not excessive.[5]

As for individuals, the Bureau wisely suggests that imprisonment should be reserved for cases with particularly aggravating circumstances, such as where the individual led or coerced other cartel members or personally profited from the unlawful conduct. However,

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4 *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 42

5 *R. v. Bocskei* (1970), 54 Crim. App. R. 519, at 521 (C.A)

the Draft Bulletin does not address the cautionary provisions of subparagraphs 718.2(d) and (e) of the *Criminal Code* which state as follows:

> *(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
>
> *(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

At least one Canadian court has expressed the view that the goal of general deterrence has not been well served by the imposition of jail sentences in criminal offences.[6] Canada does not have an established practice of jailing individuals involved in criminal cartels. To seek imprisonment, the Bureau would have to establish that sanctions such as suspension of sentence and probation orders are unreasonable in the circumstances, when considered with other sentencing factors. In this regard, defence counsel would rely on a long line of Canadian antitrust cases where fines, and not imprisonment, were imposed on individuals for their role in the offences. The CBA Section is not aware of empirical evidence showing that harsh penal sentences result in greater compliance with the Act. Indeed, the risk of severe penalties can act as a deterrent to admissions of guilt, rehabilitation and the resolution of cases without protracted litigation.

(ii) Aggravating/Mitigating Factors

The Draft Bulletin sets out a number of aggravating and mitigating factors that the Bureau will consider in sentencing recommendations. Though many of these factors are consistent with the approach in the *Criminal Code*, a number deserve comment. Aggravating factors in the sentencing process must be proved by the Crown beyond a reasonable doubt.[7]

a. Aggravating factors

Paragraph 38 notes that recidivism is an aggravating factor. The CBA Section agrees that prior convictions or violations of court orders under the Act may be relevant to a sentencing assessment or recommendation, but does not believe that prior convictions or violations of court orders for non-competition law violations should be given the same weight as an aggravating factor. This should be clarified in paragraph 38.

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[6] *R. v. Wismayer* (1997), 115 C.C.C. (3d) 18, at 36 (Ont. C.A.)

[7] *Criminal Code*, s. 724(3)(c).

Paragraph 40 identifies "large corporate size or market share" as an aggravating factor. Two reasons are offered –large firms are sophisticated corporate actors, and companies with "sizeable market share" that engage in cartel activities may be able to cause greater harm. The decision to apply an aggravating factor in a sentencing assessment should not be based on questionable assumptions which may be unrelated to the particulars of the matter. Though the size of the enterprise often is a factor in other sentencing contexts, it is of limited relevance to the type of conduct that tends to be the subject of leniency applications in competition cases. If the reference to "large corporate size" is aimed at addressing situations where firms ought to have or did have compliance programs (and the conduct in question occurred despite this), the Draft Bulletin should be explicit in this regard. Similarly, the reference to "large market share" is vague, suggesting that the aggravating factor may apply to a firm with a strong position in a particular market that may be unrelated to the conduct under consideration in the sentencing assessment. If reference to a firm's market share is included as an aggravating factor, the CBA Section suggests that market share is only relevant to the extent that it relates to antitrust markets clearly and directly affected by the conduct in question. Otherwise, this paragraph ought to be deleted.

Paragraph 42 says obstruction will be considered as an aggravating factor. However, as the Draft Bulletin itself notes, obstruction is a distinct criminal offence under the Act and the Code – and the Bureau has been willing to recommend prosecution in this regard. Given this, there is no reason to consider this conduct as an aggravating factor.

In paragraph 43, it is unclear how duration of illegal activity "goes beyond" the calculation of volume of commerce, as the Draft Bulletin suggests, when it suggests elsewhere that the volume of commerce is calculated by aggregation of the value of sales of the product in question "over the time period that they participated in the offence".[8] This part of paragraph 43 should be deleted.

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[8] See Paragraph 29.

b. Mitigating factors

Paragraph 49 considers restitution to victims as a mitigating factor, but exposure to section 36 claims is not. This is illogical, considering the overall remedial scheme of the Act. Damages paid pursuant to section 36 claims (most often in the context of class proceedings) are restitutionary in nature. If the general principle of restitution as a mitigating factor is accepted (as seems to be the case from the first sentence of the paragraph), there is no reason to treat exposure to section 36 claims as a derogation from this principle. Accordingly, the last sentence of paragraph 49 should be deleted.

(iii) Prohibition Orders, Sentencing Recommendations for Corporations and Individuals

Prohibition orders under section 34 of the Act appear to be an important, forward-looking tool to promote conformity with the Act. The description of these orders in the Draft Bulletin is helpful for practitioners in jurisdictions with no comparable mechanisms. It would be constructive to include examples of prior practice with prohibition orders in Canada, perhaps through links to decisions or press releases recording the orders.

The Draft Bulletin conveys a strong inference that the Commissioner will not recommend a stand-alone prohibition order under subsection 34(2) of the Act in lieu of criminal charges, a guilty plea and a fine. The Draft Bulletin discusses prohibition orders only in conjunction with a guilty plea. For example, "Sentencing Recommendations for Business Organizations" (paragraph 53) refers to the typical practice of recommending a range of fines as well as a prohibition order. Describing sentencing recommendations for individuals, the Draft Bulletin indicates that where there are persuasive mitigating factors, the Commissioner "is likely to recommend a fine and a prohibition order". Earlier in the Draft Bulletin, paragraph 34 states that, in principle, the Commissioner would not recommend a fine that represents less than 10% of the affected volume of commerce.
The Draft Bulletin makes no reference to the possible resolution of an investigation through a prohibition order without a guilty plea, as envisaged by subsection 34(2) of the Act. It is not clear if the Bureau is signaling a change in its prior practice, or that as a matter of policy it will not make use of the authority granted by Parliament under this section. Certainly there has been notable reliance in the recent past on prohibition orders as the sole outcome

of a Bureau inquiry. These include orders against Sotheby's in the fine art auctions inquiry in 2006, a settlement of a price-fixing allegations by companies engaged in auto body repair in Fort McMurray in 2007, and an order against companies and individuals engaged in the bio-insecticide and insect control inquiry in 2008.

In the CBA Section's view, it is desirable for the Bureau to maintain the flexibility provided by a stand-alone prohibition order, and to clarify the circumstances when it might recommend a disposition based on subsection 34(2) alone, without a guilty plea. The degree of culpability (relative to other parties), submission to coercion by others, a cartel's limited economic impact in Canada, the extent and relevance of penalties imposed by other enforcers investigating the same cartel, and willingness to cooperate, are some factors that might warrant a prohibition order without a guilty plea, even in cases where another party has obtained immunity. If the prospective posture of the Commissioner is that a prohibition order by itself is not an option, it would be preferable to make that clear, rather than a matter of inference. Finally, it would be helpful to describe the DPP's attitude to reliance on prohibition orders, either in the eventual leniency policy or in a companion document of the DPP, such as the Deskbook.

a. Sentencing Recommendations for Business Organizations and Individuals

A number of important questions arise about individual and corporate consequences under the Draft Bulletin.

The indication that the Bureau will recommend a range of fines for a corporate cartel participant generates unnecessary uncertainty, relative to current practices. The Draft Bulletin does not provide guidelines on how a range would be calculated.

With regard to inability to pay, the Bureau's willingness to consider accommodating a financially constrained offender is both constructive and consistent with existing law and with the practice of other agencies internationally. Claims of financial difficulty are often made, and sometimes difficult to evaluate. The Draft Bulletin properly places the onus on the party to satisfy the Bureau and the DPP about inability to pay an otherwise appropriate fine. However, what must be established by a party to show it is not in a position to pay a

fine is unnecessarily ambiguous. Greater precision about the nature, duration and severity of the financial difficulties that justify a deferral or reduction in a penalty would be desirable in dealing with claims of financial incapacity, both for the Bureau and the parties concerned. It is also important to know whether security for payment would be required, if a deferral of payment is considered, and what criteria would be considered for a reduction in the otherwise applicable penalty. Those issues would necessarily be an element of the sentence, and it is appropriate to set out the Bureau's expectations in this area.

With regard to the treatment of individuals, the Courts and the Bureau have been consistent about the need for individual accountability and consequences for cartel behaviour.

However, the Bureau's policy on the treatment of individuals is less transparent. The Draft Bulletin emphasizes that individual liability for cartel activity is a significant deterrent to the formation of and participation in cartels. It sets out some considerations that might be taken into account, including individual profits or benefits from cartel participation, sanctions applied to the individual elsewhere, or, apparently, non-public enforcement consequences such as loss of employment. However, the guidance in the Draft Bulletin is expressed in a highly tentative manner and provides no direct guidance on the Commissioner's policy about charges against individuals involved in cartel activity.

Culpable corporations and potentially implicated individuals should not be left to guess if individuals are likely to be charged. At present, there might be a strong probability that individuals will not be charged when the corporation agrees to plead guilty to a cartel offence. The Draft Bulletin appears to put a premium on cooperation, which generally depends on individual disclosures. In deciding to seek leniency, there should be no surprises about the Bureau's attitude to individual charges for management of the corporate accused, its counsel or the individuals that may have represented the company in the cartel. The Draft Bulletin should clearly set out the Bureau's policy on such a critical aspect of leniency.

IV. LENIENCY CONSIDERATIONS IN SENTENCING RECOMMENDATIONS

(i) Leniency Considerations in Sentencing

The Draft Bulletin does not differentiate between plea bargain negotiations and leniency applications. The principles and approach should, in the view of the CBA Section, be the same. Experienced defence counsel recognize that the process described in the Draft Bulletin generally accords with discussions exploring non-litigated outcomes in a settlement context.

What the Draft Bulletin does create – for the first time and in ill-advised fashion, in the CBA Section's view – is a requirement that before a company or individual will qualify for lenient treatment, it must acknowledge that it has committed a criminal offence. There is no tenable basis for this requirement. The CBA Section believes this requirement creates a strong disincentive for cooperation because the potential leniency applicant must admit that it committed an offence, and then must negotiate a potential resolution having lost the ability to contest liability and seek a judicial outcome in respect of the conduct.

A proposed leniency applicant coming forward to the Bureau will provide evidence of its questionable conduct and that of others. It should qualify for favourable treatment by having chosen – responsibly – to come forward voluntarily to advise of an issue. Yet under the Bureau's proposal, it gets no benefit for doing so, unless it agrees – upfront and without knowing the outcome of any negotiation – that it has committed a criminal offence. For most companies and individuals, that uncertainty of outcome will act as a very powerful disincentive to coming forward.

These concerns are exacerbated dramatically by the lack of protection for evidence given by a leniency applicant whose application ends up being denied for the reasons identified in the Draft Bulletin, or whose negotiated outcome is not accepted by a court.

(ii) The Leniency Process

The procedure contemplated in the Draft Bulletin would have the leniency applicant approach the Bureau and make a series of admissions, first by way of "proffer" and then by way of "full and frank disclosure" which requires the applicant to provide inter alia all non-privileged information, records or other things in its possession as well as producing witnesses for interview at an early stage in the process. It is only after this point that the Bureau will make its final recommendation for leniency. While it is understandable that the Bureau wants to make its assessment on the totality of information available from the applicant, the length and ultimate uncertainty of the process creates potential problems. It is also not evident that further disclosure is required to permit an informed decision by either the Bureau or the applicant, and the Bureau's proposal in this regard, a requirement that relevant individuals submit to an interview before the negotiations, is premature and potentially prejudicial.

Although the process is said to be "without prejudice", the proffer process may break down or other discussions with the Bureau may not lead to a positive recommendation for leniency. What then becomes of the information and evidence provided by the applicant? The jurisdictional authority suggests that subsequent prosecutorial use by the Bureau of information or evidence from the applicant (which it undoubtedly provides with hope of favour or promise of advantage) would constitute an abuse of process by the prosecution.[9] The Bureau will already know with some specificity "the anti-competitive activity for which leniency is sought and its effect in Canada". But at that point, the applicant will have apparently received no guidance on what it – or its individuals – should expect as a penalty. The discussions may not lead to a satisfactory result for the applicant and it may decide to contest any charges. Disclosures made "without prejudice" would not preclude use of the information sought early in the process to fill gaps in the cooperation of the immunity

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[9] See, e.g. *R. v. Jewitt* (1985), 21 C.C.C. (32) 7 (S.C.C.); *R. v. Keyowski* (1988), 40 C.C.C. (32) 481 (S.C.C.)

applicant and to enable the Bureau to develop derivative evidence from other sources.[10] The Draft Bulletin should therefore state that any subsequent direct or derivative prosecutorial use against the leniency applicant of evidence or information obtained from it should, with the possible exception of obstruction proceedings, be barred.

An approach by a party seeking leniency is a settlement initiative. That initiative implicates the interests of different parties, some of whom may not be represented by counsel, even though their cooperation may determine the degree to which lenient treatment may be granted. In many ways, the consultation paper provides helpful advice to potential applicants, but it raises many questions about safeguards that should be available.

The Draft Bulletin gives no direct indication of the Bureau's or the DPP's view of whether the proposed process is of a privileged nature. That is a vitally important question from two perspectives. Firstly, if the leniency negotiations break down, uncertainty about privilege might imply that admissions or evidence by the applicant may be used against it in a subsequent prosecution, as the Draft Bulletin seems to expect. Secondly, if there is any doubt about the privileged character of the process, then a serious disincentive will be at play: the applicant may be held to have waived privilege not only in respect of the Bureau discussions, but in proceedings with other enforcers and potentially in civil actions in Canada and abroad.

Moreover, the application process apparently involves only the corporate applicant and the Bureau, not the DPP. The Bureau has no legal authority to enter into a settlement. While the Draft Bulletin is clear that the Bureau will cooperate with the DPP, absence of the decision-maker from the discussions may cast a cloud over the applicability of settlement privilege.

The Draft Bulletin does more than cast a doubt on the privileged character of a leniency application. The Draft Bulletin is explicit in its expectation that information provided by the

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10 Moreover, there are at this point no assurances as to the treatment of the individuals whose cooperation will be necessary. In the absence of a plea agreement that covers the individuals concerned, before the evidence derived from exposed individuals is provided, they should have access to independent counsel.

applicant may be used against it if it fails to comply with its leniency “obligations”. The Draft Bulletin also asserts that the Bureau may revoke its leniency recommendation if it concludes that the party consistently fails to cooperate, or if the proffer and the full cooperation are not “consistent”. The Draft Bulletin indicates that the Bureau does not consider the leniency application to be covered by settlement or other categories of legal privilege. The CBA Section believes that the Draft Bulletin should state definitively that the Bureau and the DPP consider such discussions to be privileged.

The process contemplated requires too much cooperation, too soon. It risks driving a wedge between the company and its employees. It sets an evidentiary standard of “value” that cannot be assessed in advance, and leaves the applicant vulnerable to a dispute about the outcome that may be offered by the DPP, after it has compromised its ability to defend. If the party is subject to arguments that it has waived any claim of privilege, the party is prejudiced in unrelated proceedings. The process set out in the Draft Bulletin needs significant reconsideration. In appropriate circumstances, leniency agreements with the DPP should be entered into earlier in the process, on the basis of information proffered by counsel, and before applicants are required to produce documents or make witnesses available for interviews. At a minimum, the Draft Bulletin should confirm that the application process is privileged and that information provided to the Bureau or the DPP in the course of the application process by an applicant for the benefits associated with leniency will not be used, directly or derivatively against the leniency applicant or individuals associated with it.

V. CONCLUSION

In summary, though the Draft Bulletin provides welcome clarity with respect to the Bureau’s approach to leniency, there are still a number of issues that should be considered. As a general matter, the leniency process ought to be guided by the principles of predictability and transparency, including recognition of the distinct role of the DPP. More specifically, the CBA Section has identified areas that require further examination, including the approach taken in the Draft Bulletin to measuring economic harm, proposed aggravating/mitigating factors, the relevance of stand-alone prohibition orders and the

leniency process itself. The CBA Section offers these comments in a constructive manner, and would be pleased to further discuss any of the issues raised in this submission.