THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Comments on Draft Information Bulletin on Trade Associations

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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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.

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TABLE OF CONTENTS

Comments on Draft Information Bulletin on Trade Associations

I. INTRODUCTION 1

II. GENERAL COMMENTS 1

III. SPECIFIC COMMENTS 4

Introduction 4
Part 1: Background 5
Part 2: Relevant Provisions and Factors Assessed 5
Part 3: Association Activities that May Raise Concerns 6
Part 4: Best Practices 8
Part 5: Binding Written Opinions Program 9
Appendix 1 9

IV. CONCLUSION 10

ANNOTATED COPY OF THE DRAFT BULLETIN

Comments on Draft Information Bulletin on Trade Associations

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the Competition Bureau's Draft Information Bulletin on Trade Associations (the Draft Bulletin).

The CBA Section strongly supports the Bureau's continuing efforts to clarify its enforcement policies by publishing guidelines, information bulletins, speeches, press releases and other interpretive aids for the Canadian business community and consumers. In this specific case, the CBA Section supports the Bureau's decision to provide guidance on the applicability of the *Competition Act* to activities conducted by or under the auspices of trade associations. Trade association compliance is an important and timely issue for the Bureau to address.

The CBA Section agrees with much of the Draft Bulletin's contents. Accordingly, our comments focus on areas of suggested improvement and clarification. The annotated copy of the Draft Bulletin, attached, marks up some of our suggestions into the text.

II. GENERAL COMMENTS

Context

Trade association activity continues to come under scrutiny in Canada and elsewhere. The CBA Section suggests that it would be helpful to emphasize this point and provide illustrative examples in the Draft Bulletin (e.g., in a revised Introduction).[1] This will help

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[1] For example, according to the *Global Competition Review*, competition investigations involving trade associations were undertaken in a variety of jurisdictions in 2008, including the United States (chiropractors); Belgium (driving schools); Spain (dentists/iron industry/call centres/private security companies); Sweden (advertising companies); and Pakistan (accountants).

the target audience (trade associations and their members) fully appreciate the extent to which their conduct can be the focus of antitrust proceedings and form the basis for liability.

In a similar vein, the CBA Section suggests that the Draft Bulletin would be enhanced if greater effort were made to integrate specific case examples into the text rather than isolate them in an Appendix. Again, the goal would be to convey to the readers that the concerns addressed in the Draft Bulletin are real and not merely theoretical. (As noted in Part III below, the CBA Section believes that there are additional cases that also could be usefully referred to other than the three currently discussed in Appendix I.)

Be More Concise Where Possible

Portions of the Draft Bulletin could be more concise and would benefit from additional editing. This applies in particular to Part 2 of the Draft Bulletin (Relevant Provisions and Factors Assessed). For example, section 2.4 goes on at length about the Act's restrictive practices even though the actual examples (on page 11) seem to relate largely to section 79 (abuse of dominance). Another option is to move the bulk of Part 2 into an Appendix and include in the text of the Draft Bulletin only very brief references to the relevant provisions and supporting examples of how they could apply to trade association activity.

Accessibility to the Target Audience

Parts of the Draft Bulletin could avoid using legalisms that may not be clear to the lay reader or generalities that lack sufficient specificity. As an example, the statement is made on page 18 of the Draft Bulletin (section 3.7.2) that "voluntary codes should not be used in a way that could substantially reduce competition" without giving examples of what the Bureau means by this statement. Similarly, section 3.7.3 of the Draft Bulletin states that standard setting organizations should "generally avoid" adopting certain types of standards, without explaining the Bureau's view of when it is actually permissible/not permissible to adopt these standards (page 18). In the first paragraph in section 3.1 (Information Sharing), the discussion uses terminology ("homogenous" products, "competitive variables") that may not be understood by non-specialists. Additional examples are in Part III of this submission (Specific Comments) and in the attached mark-up.

The CBA Section suggests that the Bureau review the Draft Bulletin to ensure the language is clear and non-technical and that examples are provided wherever possible to give concrete meaning to general statements. The goal should be to make the Draft Bulletin useful to the business people and association executives who are the Bulletin's principal target audience.

Best Practices/Guidelines

The CBA Section considers it particularly helpful that Part 4 of the Draft Bulletin incorporates best practices or guidelines. The CBA Section also acknowledges the helpful opening statement in section 4.2 that these guidelines represent a non-exhaustive list of procedures which trade associations "can follow" to avoid potential issues under the Act. Nonetheless, the CBA Section suggests that it would be preferable for the Draft Bulletin to incorporate a more robust statement leaving no doubt that the guidelines are suggestions only and should not be treated as mandatory. It is important to avoid confusion on this point because associations might disregard the guidelines in their entirety if they believe there is no flexibility to adapt the guidelines to the association's specific circumstances. The CBA Section recommends using similar language to that in the preface to Appendix A of the Bureau's recently released *Information Bulletin on Corporate Compliance Programs*, which sets out a suggested "Corporate Compliance Program Framework".[2] The key message should be the same, i.e., that: (i) the Bureau's guidelines are intended to be a flexible tool that should be adapted to the specific circumstances of particular trade associations; and (ii) trade associations will not be considered deficient if their programs and procedures do not conform to the Bureau's guidelines in every respect. This concept also should be consistently reflected in the guidelines themselves as well as elsewhere in the text of the Draft Bulletin where the Bureau recommends that certain conduct be adopted. Additional examples are in Part III of this submission (Specific Comments) and the attached mark-up.

"Informal" versus "Formal" Sessions

The CBA Section suggests that the Bureau place greater emphasis in the Draft Bulletin on the risks posed by "informal" meetings of competitors at trade association events. As recognized by the OECD in a recent report, trade associations often have in place

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[2] See Competition Bureau's *Corporate Compliance Bulletin* (October 24, 2008), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02732.html

compliance procedures to avoid improper discussions at their formal sessions (similar to what the Draft Bulletin suggests in its Best Practices section).[3] However, as the Bureau well knows, trade association meetings also offer many opportunities for "unofficial" interactions that can provide a forum for anticompetitive discussions. The CBA Section suggests the Bureau use the Draft Bulletin to highlight these risks. For example, the discussion in Part I (Background) could benefit from this additional emphasis (see page 5).

Impact on Competition

On occasion, the Draft Bulletin is unclear about the degree of impact on competition required to create liability under the Act. For example, the first paragraph in section 3.7.1 states that there is a risk that association rules and regulations "can have a negative impact on competition". This type of language leaves the erroneous impression that any negative impact on competition can be an issue, whereas the Act requires that there be a substantial or undue impact on competition for liability to arise (depending on the provision). The CBA Section suggests that this type of erroneous impression can be corrected without being overly technical. For instance, using the above example, the Draft Bulletin could state that there is a risk that association regulations "can result in a substantial reduction in competition contrary to the Act", and then set out how this risk could materialize. (The attached mark-up highlights additional occasions where similar changes should be made.)

III. SPECIFIC COMMENTS

Below are more specific comments on the Draft Bulletin. In addition, we attach a mark-up with selected drafting suggestions.

Introduction

- The CBA Section suggests deleting the reference to the ABA publication in the second paragraph of this section. As a general matter, the CBA Section does not believe it is appropriate for a Bureau publication to cite non-Canadian authorities unless there is a specific reason for their inclusion. One option might be to add an Appendix listing helpful materials from other jurisdictions, such as the ABA publication and the OECD Report mentioned previously.

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[3] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations*, November 4, 2008 (the "OECD Report"), available at http://www.oecd.org/dataoecd/40/28/41646059.pdf

Part 1: Background

- The Bureau should consider including a discussion of what its enforcement approach will be in situations where a trade association may be an unwitting rather than active participant in the alleged anticompetitive conduct (e.g., where members use association events as a "cover" for their conduct). For example, are there circumstances in which the Bureau might pursue the association for "aiding and abetting" the offence or consider the association to be a "party" to the offence?

Part 2: Relevant Provisions and Factors Assessed

2.1 Section 45: Conspiracy

- The discussion on page 7 of the elements of the section 45 conspiracy offence does not seem entirely consistent with the Supreme Court of Canada's decision in *PANS*.[4] It would be more accurate to say that there are two elements to the offence (*actus reus* and *mens rea*), each of which has two aspects, rather than three elements. In any event, the statement in the Draft Bulletin is inaccurate in saying that the elements must be met in determining whether or not a conspiracy exists; the issue is whether or not the conspiracy offence has been committed. To simplify matters, the CBA Section suggests starting off the second paragraph as follows: "The Crown (Public Prosecutions Service of Canada) must prove the following elements beyond a reasonable doubt in order to obtain a conviction under section 45".[5]
- The defence offered by subsection 45(3) is of increasing importance for industries and their associations, particularly as they embark on various environmental initiatives. It would be helpful, therefore, if the Bureau could go beyond the very generic discussion in the Draft Bulletin and provide one or more concrete examples (based on experience or theoretical) of when an agreement that falls under subsection 45(3) could still be considered illegal by virtue of the operation of subsection 45(4). For example, reference could be made to the written advisory opinion issued to the Society of Obstetricians and Gynaecologists of Canada, which considers this issue.[6]

2.2/2.3 Section 47: Bid-Rigging/Section 61: Price Maintenance

- The Bureau could provide examples of how the bid-rigging and price maintenance sections of the Act could apply in the trade association context, as the Draft Bulletin does for the other provisions it discusses.[7]

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4 See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, available at http://www.canlii.org/en/ca/scc/doc/1992/1992canlii72/1992canlii72.html

5 Note that this leaves aside any discussion of subsection 45(1)(b).

6 See *Society of Obstetricians and Gynaecologists of Canada ("SOGC"): Agreement to Reduce Samples* (July 13, 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02558.html

7 Several helpful examples of how section 61 could apply are set out in a speech by John Pecman to the Property & Casualty Industry Insurance Forum, *Competition Law and Trade Associations* (May 23, 2008), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02718.html

Part 3: Association Activities that May Raise Concerns

3.1 Information Sharing

- Given the importance of this issue, the CBA Section suggests that it would be helpful to provide more specific advice or examples (based on experience or theoretical) of when (or if) an agreement among trade association members to exchange information may in itself violate section 45.
- This is an instance where the Draft Bulletin's recommendations for trade association conduct are too absolute and do not convey the appropriate message of flexibility. For example, the last bullet point on page 12 (independent data collection agency) is too prescriptive. The need to consider using an independent agency will depend on the circumstances, such as the type of information involved and whether the association members could conceivably be viewed as possessing market power. The CBA Section suggests rewording this bullet point as follows to reflect this point:

  > Consider using an independent collection agency – In certain circumstances, trade associations may consider using an independent firm to collect data. This is an additional way to preserve the anonymity of individual members and their data.

- Similarly, the statement in the second to last bullet on this page that information exchanged "should not reveal individual firm data or specific transaction data" is too strict as a general proposition. For example, there should be no concern if the data deals with issues that are not necessarily competitively sensitive. The CBA Section suggests rewording this paragraph as follows:

  > Where appropriate, only disseminate information in an aggregated form – Trade associations should not disseminate individual firm data or specific transaction data without considering whether the data is of a competitively-sensitive nature (e.g., pricing data). If it is, then the association should disseminate the data in aggregated form. Aggregating competitively-sensitive information so that individual data cannot be identified makes it unlikely that the disclosure of such information will have an adverse effect on competition.

See the attached mark-up for additional suggestions.

- Several bullet points on the same page also state that adhering to the Bureau's recommendations will only "reduce the likelihood" of violations (or similar language to that effect). This creates unnecessary doubt about the utility of the Bureau's recommendations and more definitive language should be used, e.g., "makes it unlikely" that concerns will be raised. See the attached mark-up for specific suggestions.

3.2 Agendas and Meetings

- The CBA Section suggests that it is unrealistic and often unnecessary to recommend that every trade association have legal counsel review agendas and minutes and attend all association meetings where there is "potential" for discussion of sensitive subjects (page 13 of the Draft Bulletin). First, many associations have memberships that include a wide range of firms that are not necessarily competitors – e.g., the Chamber of Commerce – and it seems

unnecessary to require legal counsel to review all agendas and minutes in those circumstances. Second, where an association includes mostly or only competitors, there is always "potential" for discussion of sensitive subjects. While attendance of legal counsel may be a preferred practice, it is not realistic for many associations to have counsel attend all meetings.

- As noted in Part II of this submission, the CBA Section believes that there is greater risk that "informal" meetings and conversations at trade association events could lead to anticompetitive conduct. Accordingly, we recommend that the phrase "should be treated with great caution" in the second paragraph of section 3.2 be supplemented with the following admonition: "and should not, under any circumstances, involve discussions of competitively sensitive topics".

3.4 Association Discipline

- The meaning of the first sentence of this section is unclear. Is it the "recommendations" referred to that "may have an anticompetitive effect" or the imposition of sanctions that may render the recommendations anticompetitive? Based on the rest of the discussion in the section, it seems that the Bureau intends to convey the latter meaning. Assuming that is the case, the CBA Section suggests rewording the first sentence to make this meaning apparent and also to clarify that the use of sanctions will not, in all cases, be anticompetitive: "Imposing sanctions to enforce association recommendations may, in certain circumstances, lead to anticompetitive effects". See the attached mark-up for additional drafting suggestions.
- The Bureau also might consider discussing other possible situations – apart from fee guidelines or recommendations – where coercion/sanctions can give rise to competition concerns, e.g., in the development of policies and responses directed to non-members.

3.5 Fee Guidelines

- Fee guidelines are clearly an important issue for the Bureau.[8] While the Bureau may not favour the use of fee guidelines, it recognizes they are legal provided that certain criteria are satisfied, e.g., the guidelines are voluntary and non-binding. The CBA Section welcomes the Draft Bulletin's acknowledgment of the legality of properly structured fee guidelines.[9] It is helpful that the Draft Bulletin sets out the criteria which the Bureau believes must be satisfied by fee guidelines in order not to raise issues under the Act. However, the value of this list of criteria is undermined by the Draft Bulletin's use of the equivocal phrase "are less likely to raise concerns under the Act" (emphasis added). As noted previously on the Information Sharing section, the CBA Section suggests this equivocal language is

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[8] For example, they are an important area of discussion in the Bureau's recent study on professions, *Self-Regulated Professions – Balancing Competition and Regulation* (December 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html

[9] See also the written advisory opinion provided to the Working Group on Lawyers and Real Estate, *Real Estate Industry – Suggested Fee Schedule* (August 30, 2006), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02204.html

not as helpful as stating that fee guidelines will not raise issues (or are unlikely to raise issues) where the Bureau's conditions are met.

3.7 Self-Regulation, Voluntary Codes and Standard Setting

- With respect to section 3.7.2, it would be helpful for the Bureau to explain why "explicit commitment of the leadership", "acceptance by members" or "regular flow of information" are characteristics of voluntary codes which do not create competition concerns (page 18, second paragraph).
- With respect to section 3.7.3, the statement that: "[a]ssociations should generally avoid adopting standards that require members to gain access to intellectual property controlled by certain members of the association" (page 18, last paragraph) is on the one hand too vague (what does "generally avoid" mean) and at the same time too strict. First, this may not be practical for many standard setting organizations. Second, there should not be competition concerns if intellectual property included in the standard has been fully disclosed in the standard setting process. Such a process might include an agreement by the intellectual property owner to standard licensing terms as a condition for its intellectual property being adopted by the standard setting organization.

Part 4: Best Practices

4.2 Guidelines

General

- Some suggested guidelines under this heading could be revised to be more practical and meaningful. For example, the suggestion that a compliance officer should be appointed is likely impractical for many associations, unless that is simply another title of an existing officer who already performs these functions. The suggestion to "implement clear guidelines on association activities" is not meaningful and should be explained if the Bureau intends it to convey something substantive. Finally, the suggestion to make the board of the association sufficiently diverse so as to minimize the risk of competition law violations by including more than competitors presumes that the association itself includes more than competitors, and that associations can control who runs for these positions and is elected, which is not necessarily the case. This suggestion should be at least qualified by words such as "where applicable" or "if possible".

Agendas & Meetings

- The CBA Section believes that the suggestion to "allow all members to attend meetings so as not to exclude a specific group or segment" is too broad, particularly with regard to executive or committee meetings where only the specific members should be permitted to attend.
- It also would be helpful to include more particular guidance on what should be done if an association meeting does stray into inappropriate discussions (e.g., should the chair stop the meeting?)

Membership

- The CBA Section suggests that requiring an appeals process for membership refusals is unrealistic in many cases.

Sanctions/Discipline

- As previously mentioned, this guideline is unclear. The CBA Section suggests replacing the guideline as written with the following: "Consider whether the imposition of sanctions aimed at inducing members to follow specific association recommendations could have a substantial anticompetitive effect."

Voluntary Codes

- For the first item, please see our comments with respect to section 3.7.2 above.

Legal Counsel's Role

- The CBA Section suggests that the recommendations that legal counsel approve the agenda or minutes of any association meeting and actively participate in association meetings are too broad. For example, this would represent an impossible task for national associations, which may have thousands of members, numerous task forces, and meetings on a weekly if not daily basis. The suggestion to participate in all association meetings also seems to contradict the earlier recommendation (in section 3.2) that counsel attend meetings where "sensitive" issues are discussed.

Immunity Program

- The Bureau might consider placing this discussion under a separate heading so that it stands out and is not lost.
- It would be helpful for the Bureau to provide greater detail on how its Immunity Program applies in the context of an application for immunity by an association. For example, given the Bureau's position that joint applications for immunity will not be accepted, would the immunity extend to the association's members?[10]

Part 5: Binding Written Opinions Program

- The Bureau might consider mentioning in the body of the text, rather than in a footnote, that it charges fees for advisory opinions (and what those fees are). Fees are a matter of obvious interest to trade associations contemplating a request for an advisory opinion.

Appendix 1

- The Bureau might consider incorporating illustrative case references in the body of the Draft Bulletin and expanding the cases referred to beyond those included in

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[10] See the Competition Bureau's *Immunity Program Responses to Frequently Asked Questions*, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02482.html

this Appendix. For example, the Bureau might consider discussing (or at least citing where relevant) the reported cases in which convictions were registered against trade associations or in which trade association personnel were charged (e.g. Electrical Contractors - 1961 (OCA), B.C. Pharmacists (1971 BCSC), Armco (1974 Ont.H.C.), Container Materials (1991 SCC)).

- The Bureau also might consider summarizing and citing relevant advisory opinions that have been made public, such as the advisory opinion provided to the Society of Obstetricians and Gynecologists of Canada and the advisory opinion provided to the Working Group on Lawyers and Real Estate (referred to above).
- With respect to the three cases summarized in Appendix 1, it is important to clarify that the Kent County Law Association and real estate orders were issued under section 34(2) of the *Competition Act* and, as such, did not involve convictions or any finding of guilt. For that reason, the references to "Time Frame of Conspiracy" and "Trade Association Activity and Conspiracy" should be changed to "Time Frame of Conduct" and "Trade Association Activity". See attached mark-up for additional comments.
- It is also important that the summaries in the Appendix are reviewed carefully to ensure they are fair and accurate. For example, the summary of the "Real Estate Prohibition Order":

  (i) inaccurately suggests that the some of the particular conduct described was engaged in by more than one board; and

  (iii) refers to prohibitions against "attempting to control" entry or advertising that are not in the actual prohibition order.

IV. CONCLUSION

The CBA Section thanks the Competition Bureau for the opportunity to submit these comments and hopes that they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.

Comments of the Canadian Bar Association, Competition Law Section

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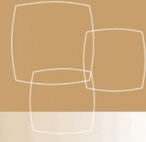
Draft Information Bulletin on Trade Associations



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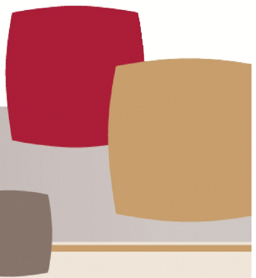

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Canada

Table of Contents

Introduction 3
Part 1: Background 4
Part 2: Relevant Provisions and Factors Assessed 5
2.1 Section 45: Conspiracy 7
2.2 Section 47: Bid-Rigging 8
2.3 Section 61: Price Maintenance 9
2.4 Sections 75, 77 and 79: Restrictive Trade Practices 9
2.5 Sections 52 and 74.01(1)(a) and (b): False or Misleading Representations and Deceptive Marketing Practices 11
PART 3: Association Activities that may raise concerns 11
3.1 Information Sharing 12
3.2 Agendas and Meetings 13
3.3 Association Membership 13
3.4 Association Discipline 13
3.5 Fee Guidelines 14
3.6 Advertising 15
3.7 Self-Regulation, Voluntary Codes and Standard Setting Organizations 15
3.7.1 Self-Regulation 15
3.7.2 Voluntary Codes (Codes of Conduct) 17
3.7.3 Standard Setting Organizations 18
Part 4: Best Practices 19
4.1 Compliance Programs 19
4.2 Guidelines. 19
Part 5: Binding Written Opinions Program 22
APPENDIX I 23
APPENDIX II 31

Introduction

This Bulletin provides information and guidance on the applicability of the *Competition Act* (the “Act”) to the actions and activities conducted by or under the auspices of trade associations. The Act is administered and enforced by the Commissioner of Competition (the “Commissioner”) and the Competition Bureau (the “Bureau”).[1] The Commissioner is an independent law enforcement official appointed by the Governor in Council.[2]

[Note: See the CBA Section's comments.]

Trade associations (“associations”) are associations consisting of “individuals and corporations with common commercial interests who, under the auspices of the organization, join together to take joint actions that further their commercial or professional goals”.[3] In most instances, associations serve legitimate purposes such as promoting their common interests to the public, government and other targeted audiences and seeking to improve their competitive position in the markets in which they operate. Associations perform many beneficial functions for their members and their activities generally do not raise issues under the Act.

[Note: Cross reference to Part 5.]

However, the very nature of associations, especially those that bring together competitors, creates a risk that they could be used, directly or indirectly, as a vehicle for anti-competitive activities. In particular, associations could be used to assist in the implementation of anti-competitive agreements and other collective actions that raise competition law issues. Associations must therefore be careful to avoid conduct which could be in violation of the Act.

The content of this Bulletin is not intended to serve as legal advice. Readers should refer to the Act when questions of law arise and, if a particular association activity gives rise to concerns, should obtain independent legal advice. They may also wish to request a binding written opinion from the Commissioner pursuant to section 124.1 of the Act.

The Bulletin is organized into five parts and two appendices as follows:

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[1] For the purposes of this Bulletin, the terms “Commissioner” and “Bureau” are used interchangeably. The terms are also used to include any “person who performs or has performed duties or functions in the administration or enforcement of” the Competition Act.

[2] The Commissioner is also responsible for the administration and enforcement of the Consumer Packaging and Labelling Act (except for food as that term is defined in the Food and Drugs Act), the Textile Labelling Act, and the Precious Metals Marking Act.

[3] Source: American Bar Association, Section of Antitrust Law, Antitrust and Trade Associations: How Trade Regulations Apply to Trade and Professional Associations, 1996, p.2.

- Part 1 provides a general description of associations.
- Part 2 provides an overview of the key provisions which could apply to association activities.
- Part 3 focuses on activities that are engaged in by associations and their members that may raise concerns under the Act. This Part also looks at factors that may be assessed to determine whether an association's activity may raise issues under the Act.
- Part 4 discusses best practices which associations can adopt so as to avoid contravening the Act.
- Part 5 provides information on binding written opinions.
- Appendix I provides a brief description of some cartel cases where associations were engaged in anti-competitive acts.
- Appendix II sets out the full text of the key provisions.

Part 1: Background

Insert: affecting their industries

Associations vary considerably in size and membership and can represent members from different trades or professions[4] or be specific to one. Many association activities do not raise issues under the Act and can provide benefits to the industry and consumers at large. Such benefits include activities that keep members informed of industry developments, set standards for products and services, improve the quality and safety of products for consumers and work at improving ~~industry~~ laws. Associations are also involved in other beneficial activities, which include publishing trade journals, lobbying, product and market research and advertising and promotion. All these types of activities can help both consumers and association members and produce significant economic benefits. Associations can also assist their members in better understanding trends and industry conditions.

In addition to the beneficial functions associations perform for their members, associations can also act as important venues to promote competition law and pro-competitive activities. For example, associations can be good sources of intelligence for the industry as they have the capacity to identify marketplace issues and can often assist in resolving these issues by acting as the liaison between the Bureau and the industry. Associations can also assist the Bureau in its outreach initiatives by providing opportunities to reach a broad audience and to work cooperatively with the Bureau to promote a marketplace where consumers can make

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[4] For more information on the treatment of professional associations under the Act please refer to the recently published report *"Self-regulated professions-Balancing Competition and Regulation"* at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02523e.html

informed purchasing decisions and businesses are assured a level playing field.[5] For this reason and others, the Bureau strives to foster good relationships with associations.

Although most associations do not form for the purpose of harming competition, associations are often comprised of competitors within the same industry. As such, there is a risk that associations may be involved in activities that could contravene the Act. Of greatest concern is where an association becomes a conduit or vehicle for anti-competitive activity, such as where the association provides a forum for competitors to agree on competitively sensitive matters. Association activities which deal with subjects such as pricing, customers, territories, market shares, terms of sales and advertising restrictions can lead to anti-competitive behaviour and can raise concerns under the Act. For these reasons, associations must ensure that appropriate safeguards are implemented to guard against anti-competitive conduct.

While association members need to come together to discuss legitimate issues of concern and even exchange information relevant to association activities, care needs to be taken to ensure that such meetings do not involve communications or agreements that might raise issues under the Act. For example, there is the risk that the collection and dissemination of competitively sensitive information regarding the activities of individual members could be used to form and implement agreements among competing members that substantially harm competition. As well, there is a risk that restrictive membership policies, fee guidelines, by-laws and disciplinary procedures could raise concerns under the Act. In addition, to the extent that the legitimate operations of an association may involve some sort of regulatory function, an association may contribute to the creation of barriers to entry or restrict the ability of competitors to compete in a given market. For these reasons, it is important for associations and their members to be aware of the application of competition law and potential risks relating to their activities.

[Note: The CBA Section recommends that discussion be inserted here regarding the risks posed by "informal" meetings/ discussions at trade association events. See the CBA Section's comments.]

Part 2: Relevant Provisions and Factors Assessed

The Act is a law of general application and with limited exceptions, applies to all business activities in Canada. Generally, its purpose is to maintain and encourage competition in

[5] For example, the Bureau worked collaboratively with the Pet Food Association of Canada and other organizations, to publish the *Guide for the Labelling and Advertising of Pet Food* (Ottawa, Industry Canada, 2001). The guide provides a voluntary code of conduct setting out best practices for industry in the labelling and advertising of pet foods, as well as benchmarks the Bureau will consider when evaluating possible violations of the provisions of the *Consumer Packaging and Labelling Act* and the *Competition Act* which prohibit false or misleading representations. It can be found on the Bureau's website at www.competitionbureau.gc.ca.

the marketplace.[6] Although there are no specific provisions within the Act dealing exclusively with associations[7], there are a number of provisions that are more relevant to associations.[8] These provisions are described below.

Examinations and inquiries conducted by the Bureau in relation to an association's activities may be assessed under one or more provisions of the Act. The Commissioner's enforcement approach will depend on the relevant circumstances, including a consideration of the following:

- the particular market structure within which the relevant association members operate (market power, barriers to entry, product, geographic market, etc);
- the nature of the association activity (e.g., the nature of the information exchanged); and
- the conduct of the relevant association in connection with the activity (e.g., how the association compiled and/or disseminated information to its members).

The key provisions that are most relevant to association activities are those that deal with agreements among competitors (namely, the conspiracy and bid-rigging sections of the Act), price maintenance, restrictive trade practices, as well as those dealing with abuse of dominance and false or misleading representations.

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[6] Section 1.1 of the Act states that "(t)he purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".

[7] With the exception of section 4 of the Act which deals with collective bargaining. The full text of this provision can be found in Appendix II.

[8] Although this document provides a summary of the key provisions which could apply to association activities, more detailed information is available from the Bureau on its enforcement approach. Please consult the Bureau's website at: www.competitionbureau.gc.ca. [Note: A more precise reference would be helpful.]

2.1 Section 45: Conspiracy

Section 45[9] of the Act prohibits agreements[10] between two or more persons to prevent or lessen competition unduly.

Insert: The Crown (government) must prove the following elements beyond a reasonable doubt in order to obtain a conviction under Section 45:

~~There are three elements that must be met in determining whether or not a conspiracy exists~~:

- There must be an agreement. The agreement need not be in writing, but can be inferred from circumstantial evidence. It is not necessary for the agreement to be implemented;

- The agreement, if [Insert: it were] implemented, ~~will~~ [Insert: would] likely result in an undue prevention or lessening of competition. Undueness is a function of the market power of the parties and behaviour that is likely to injure competition.[11] There are many possible combinations of market power and behaviour that may unduly lessen competition. For example, the more restrictive the agreement, the lesser the degree of market power needed to establish an undue lessening of competition; and

- There must be intent. Specifically, the parties to the agreement must have an intention to enter into the agreement and have knowledge of its terms. In addition, the parties to the agreement must know or should have known that the agreement would, if implemented, prevent or lessen competition unduly.

Examples of agreements between association members that could raise concerns under section 45 of the Act include, among other things, agreements to fix prices~~,~~ [Insert: (e.g., to "stabilize the market"), agreements to] allocate customers or geographic markets [Insert: (e.g., to "respect market integrity")], agreements to boycott members or non-members who do not abide by association policies, especially as they pertain to pricing and fees, and agreements to restrict production.

More specifically, price-fixing could occur when members of an association agree to set prices at a particular level or agree on minimum prices. Such agreements could also take the

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[9] The complete text of this section can be found in Appendix II.

[10] For the purpose of this Bulletin, the term "agreement" includes ~~anyone who conspires, combines, agrees or arranges with another person~~ [Insert: any conspiracy, combination, agreement or arrangement between two or more persons.].

[11] *R.* v. *Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606.

form of restrictions ~~or guidelines~~ on prices decided by the association and enshrined in its rules or included in its code of ethics. In addition, concerted action by association members refusing to deal with certain competitors, or excluding them from access to the benefits of the association's jointly created resources, could be challenged as a boycott designed to influence a competitor's prices.

Section 45 of the Act contains a number of limited exceptions. For example, subsection 45(3) of the Act specify that agreements regarding the following are not subject to prosecution in certain circumstances:

- the exchange of statistics or credit information
- the definition of product standards or terminology
- the definition of sizes and/or shapes of product packaging
- cooperation in research and development
- agreements to restrict advertising or promotion, other than a discriminatory restriction against a member of the mass media
- the adoption of metric measurements
- measures to protect the environment

However, it is important to note that even these exceptions and defences are not without limitations.[12] For example, if an agreement among association members is likely to unduly lessen competition in respect of prices, quantity or quality of production, markets or customers, or channels or methods of distribution, or if the agreement restricts anyone from entering into or expanding a business, the above exceptions would not apply. Accordingly, an association that proposes to enter~~ing~~ into an agreement or arrangement that ~~has the potential to affect an element of competition, it should examine the agreement carefully and~~ seek legal advice to ensure that ~~they will not violate the provisions of the Act.~~

> Move footnote 12 here.

> Insert: otherwise covered by subsection 45(3)

> Insert: would be covered by subsection 45(3) may wish to

> Insert: the exception will apply.

2.2 Section 47: Bid-Rigging

Pursuant to section 47 of the Act, bid-rigging is an agreement where, in response to a call or request for bids or tenders, one or more bidders agree not to submit a bid, or where two or more bidders agree to submit bids that have been prearranged among themselves.[13] This section does not apply to agreements or arrangements which are "made known" to the person who called or requested the bid or tender at or before the time when any bid or tender is made by any party to

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[12] See sub-section~~s~~ 45(4) ~~and 45(6)~~.

[13] The complete text of this section can be found in Appendix II.

the agreement, such as where parties are bidding on a large project as part of a consortium. Common forms of bid-rigging include cover bidding, bid suppression, bid rotation or market allocation.[14]

2.3 Section 61: Price Maintenance

Price maintenance occurs when a person by agreement, threat, promise or like means attempts to influence upward or discourage the reduction of the price at which another person sells or advertises a product.[15] For example, it is an offence for a supplier to require resellers to sell products at specified or minimum prices. There are certain exceptions to the above, which include when the price is affixed or applied to a product or its packaging or container, and where affiliated entities are involved.[16] Price maintenance could also occur if a supplier refuses to supply a product to, or discriminates against, a reseller because of that other person's low pricing policy.

2.4 Sections 75, 77 and 79: Restrictive Trade Practices

Restrictive trade practices form a subset of reviewable matters which relate to common business conduct and decisions, such as the decision to supply or not supply a customer, the terms under which customers will be supplied and some pricing and product specification decisions. The determination of the business practices' competitive impact typically requires a case-by-case analysis as particular practices, depending on the context, can lead to pro-competitive or anti-competitive outcomes. Consequently, the Act does not contain a general prohibition of these practices, as it does for criminal offences, but rather subjects such conduct to review only where it has a significant anti-competitive effect.

Section 75 of the Act deals with refusals to supply.[17] In some cases, where a customer is unable to obtain an adequate supply of a product on appropriate terms, the Competition Tribunal may order a supplier to supply the customer on ~~un~~usual trade terms. To obtain such an order, the customer must be substantially affected in its business due to an inability to obtain supply and

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[14] For more information on bid-rigging, please consult the Bureau's website at: www.competitionbureau.gc.ca. As well, there is a presentation available on this subject at: http://mmprodnt.ic.gc.ca/mmpub/competitionbureau/bidrigging/index.html

[15] The complete text of this section can be found in Appendix II.

[16] Subsections 61(2) and (5).

[17] The complete text of this section can be found in Appendix II.

that competition is likely to be adversely affected. The customer must also be willing to meet the usual trade terms of the suppliers of the product, the product must be in ample supply and the inability to obtain adequate supplies must result from insufficient competition among suppliers.

Section 77 of the Act deals with exclusive dealing, tied selling and market restriction.[18] Exclusive dealing occurs when a supplier of a product, as a condition of supplying the product to a customer, requires or induces a customer to deal only or primarily in certain products with the result that competition is or is likely to be lessened substantially. Tied selling occurs when a supplier, as a condition of supplying a particular product, requires or induces a customer to buy a second product. It may also occur when a supplier prevents the customer from using a second product with the supplied product. Market restriction occurs when a supplier requires a customer to sell a product in a defined market, for example by penalizing or restricting the customer for selling outside that defined market.

The exclusive dealing, tied selling and market restriction provisions of the Act may apply when the following conditions are met:

- the conduct in question constitutes a practice. Different restrictive acts considered together, as well as repeated instances of one act with one or more customers, may constitute a practice;

- the restrictive practice discourages a firm's entry into, or expansion in, the market; in other words, there must be an exclusionary effect; and

- the practice has substantially lessened competition, or is likely to do so. This may happen when the supplier's restrictive practice prevents, for example, a rival's entry into the market, potential competition, product innovation or lower prices.

Pursuant to sections 78 and 79 of the Act, abuse of dominance occurs when a dominant firm in a market, or a dominant group of firms, has engaged in or is engaging in a practice of anti-competitive acts that has an intended negative effect on a competitor that is exclusionary, predatory or disciplinary, with the result that competition has been, is or is likely to be prevented or lessened substantially.[19] These provisions establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that

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[18] The complete text of this section can be found in Appendix II.

[19] The complete text of these sections can be found in Appendix II.

damage or eliminate competitors and that maintain, entrench or enhance their market power.[20]

The circumstances of each case will determine if a particular practice implemented by an association is anti-competitive or not. The ability of associations to restrict competition or create barriers to entry could raise concerns under these provisions. For example, associations restricting access to markets or certain services their members rely on or imposing educational requirements could contravene the restrictive trade practices provisions. Likewise, the setting of standards by an association in such a way as to impede entry or to restrict membership in important associations could restrict a competitor's ability to ~~fairly~~ compete in a given market.

2.5 Sections 52 and 74.01(1)(a) and (b): False or Misleading Representations and Deceptive Marketing Practices

The Act contains both criminal and civil provisions to address false or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. Under the criminal regime, section 52 of the Act prohibits firms from knowingly or recklessly making representations to the public which are false or misleading in a material respect.[21] Under the civil regime, misleading advertising or misleading representations to the public regarding the performance, efficacy or length of life of a product, which are not based on an adequate and proper test, may be subject to an order prohibiting the representations and imposing administrative monetary penalties.[22]

Associations that engage in making representations to the public must ensure that they do not make false or misleading representations. Associations should also ensure that their rules or procedures relating to advertising do not encourage or promote false or misleading representations by members.

Insert: or, alternatively, restrict pro-competitive advertising (see Section 3.6 below)

Part 3: Association Activities that may raise concerns

Certain association activities have the potential to raise competition concerns. It is not

[20] Subsection 79(7) of the Act requires that the Commissioner choose between the conspiracy, the merger or the abuse of dominance provisions when electing to proceed with either a recommendation to the Attorney General (alleging criminal conspiracy) or an application to the Tribunal (under civil provisions). The choice of which provision to pursue will depend on the facts of each case and the nature of the remedy sought to alleviate the competition issue.

[21] The complete text of this section can be found in Appendix II.

[22] The complete text of this section can be found in Appendix II.

possible to outline every possible activity where a concern may arise. There are, however, a number of activities which pose a greater risk of raising competition concerns. These activities are discussed below.

3.1 Information Sharing

Insert: time

An important task of associations is to provide their members with information relevant to their industry. The exchange of information will not necessarily give rise to competition issues under the Act. Indeed, competitive markets function more efficiently when information is relatively free and openly available to industry participants. At the same, it is recognized that information exchanged among competitors who collectively possess market power may have serious adverse effects on competition, depending upon the nature and timing of the information exchange. Where markets are characterized by high levels of concentration, barriers to entry and relative stability, information exchanges in respect of commercial information may reduce uncertainty about rivals' competitive responses and so act to further temper rivalry. When the products involved are relatively homogeneous and firms compete across a limited number of competitive variables, the risk that such exchanges will have significant adverse effects on competition is further heightened. [Note: See the CBA Section's comments.]

Insert: information

The exchange of competitively sensitive, such as information regarding current or future prices, ~~information~~ is more likely to raise competition issues under the Act. Associations should also exercise caution in the collection and dissemination of information regarding market shares, costs, levels of output, strategic or marketing plans and other similar types of information. Where an association intends to collect and disseminate information that may be commercially sensitive, associations ~~should~~ consider the following steps to ~~reduce~~ competition risks:

Insert: may

Insert: help avoid

- Collect ~~only~~ historical information ~~- For example,~~ the collection of historical pricing information ~~is less likely to raise concerns than~~ the collection of current and future prices~~;~~

Insert: , is unlikely to raise concerns.

Insert: , as opposed to

- ~~Only~~ disseminate information in an aggregated form - The ~~more generalized the information, the less likely the potential for an anti-competitive effect. The~~ information exchanged should not reveal individual firm data or specific transaction data. The dissemination of aggregated industry data ~~reduces the likelihood~~ that the disclosure of such information will have an adverse effect on competition.

Insert: makes it unlikely

Insert: Consider using

- ~~Use~~ an independent data collection agency - ~~Data collected from industry participants should be collected by an independent firm and the anonymity of~~

Insert: In certain circumstances, trade associations may consider using an independent firm to collect data. This is an additional way to perserve the anonymity of individual members and their data.

~~individual members and their data should be preserved.~~

- Do not coerce members to provide data - Association members should not be required to supply data or comply with any proposals regarding the sharing of information.

3.2 Agendas and Meetings

Insert: competitively

Association meetings should have clear agendas and comprehensive minutes. The agendas should be specific. Meetings should not become a forum for the discussion of competitively sensitive information, such as pricing, costs, market allocation, production and market shares. The discussion of discounts, payment terms, business strategy and bidding tactics are also topics that should be avoided. It is recommended that the association have legal counsel review agendas and minutes and attend all association meetings where there is potential for discussion of sensitive subjects. Associations should also have a document retention program which clearly sets out which records are to be kept ~~and for what period of time~~ in order to protect ~~itself~~ by keeping a history of previous meetings that have been held.

Insert: themselves

Informal conversations and discussions that take place outside the regularly scheduled association meetings and activities may also raise concerns. Unscheduled or informal meetings between competitors, whether held in conjunction with regular association meetings or not, should be treated with great caution.

Insert: , and should not, under any circumstances, involve discussions of competitively sensitive topics.

3.3 Association Membership

The majority of firms that choose to become members of an association do so because of the benefits provided by the association. Association membership should be voluntary and based on clear and transparent criteria. In some instances, association membership could raise issues under the Act if, for example, membership requirements, exclusions and expulsions could impair a firm's or person's ability to compete.[23] For example, excluding a potential member because of that member's refusal to adhere to certain pricing policies may raise concerns under the price maintenance provision of the Act.

3.4 Association Discipline

~~Associations should avoid sanctions aimed at forcing members to obey various association recommendations which may have an anti-competitive effect.~~ For example,

Insert: Imposing sanctions to enforce association recommendations may, in certain circumstances, lead to anticompetitive effects.

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[23] See *Canada (Director of Investigation and Research)* v. *Bank of Montreal (1996),* 68 C.P.R. (3d) 527 (Comp. Tribunal) (also known as Interac).

Insert: in the above circumstances

associations should avoid any actions or use of language in their communications to members which explicitly or implicitly require or suggest membership adherence to particular price or trade terms. Likewise, there should be no sanctions imposed on members who choose not to follow association fee guidelines.[24] Actions that take the form of direct persuasion or implied coercion are not consistent with preserving the independence of association members. However, sanctions that are implemented for legitimate purposes, such as for the failure to meet safety standards, would not raise a concern under the Act.

3.5 Fee Guidelines

The Bureau recognizes that professional associations often disseminate fee guidelines as a source of information on prevailing prices in professional services' markets.[25] However, such fee guidelines raise concerns under the Act as they may facilitate agreements on the fees to be charged by competing members. The issuance of a fee guideline which is genuinely intended to be a source of information as to the prevailing fees in a particular market would not likely, in and of itself, raise an issue under the Act. This would be so if such a guideline was issued without raising any intention or expectation that the association's members should alter their prices to conform to the fees presented in the guideline. However, a fee guideline could raise concerns under the Act if it is used to establish or facilitate an agreement on prices or promote adherence to a specified level of fees.

Insert: ¶ More specifically, fee

Insert: are adopted they should not raise

Given the negative effect of collusion on consumer welfare, it is recommended that associations look to less intrusive means to provide consumers or professionals with the information they need on prices. ~~As well,~~ If ~~adopting such a~~ guidelines, ~~a genuine suggested fee guideline is one which is issued merely for consumer or professional information purposes, without raising~~ any intention or expectation that the membership will adopt the guideline in their practices. Members must feel free to deviate from the guideline without fear of recrimination or sanction. ~~Fee~~ guidelines which have the following characteristics ~~are less likely to~~ raise concerns under the Act:

Insert: [will not/are unlikely to]

- prepared in a systematic and scientific fashion;
- comprised of statistics gathered and compiled by an independent third party;
- based on questionnaires which ask respondents what fees they have charged, on ~~average, over a given period, as opposed to what fees they consider desirable or acceptable;~~

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[24] This concept is further elaborated in the following section "Fee Guidelines".

[25] See "Self-regulated professions-Balancing Competition and Regulation" at www.competitionbureau.gc.ca.

- based on a predetermined response rate from the relevant association membership; and
- based on independent verification of a sub-sample of responses.

3.6 Advertising

The competitive benefits of advertising are numerous. For example, advertising facilitates entry by enabling new firms to make their presence and unique features widely known. It also increases consumer awareness of prevailing prices which may lead to price competition. Association activities relating to advertising typically fall into two categories: advertising conducted by the association itself and guidelines or rules adopted by an association for its members in relation to advertising.

With regard to the former, associations often promote the industry they are representing through advertising and other public statements. Whereas advertising is typically for a specific product or service, advertising conducted by an association will generally be used to promote the product, services or views of an industry. In promoting the service, product or views of an industry, an association should ensure that it does not engage in materially false or misleading representations. In addition to those provisions found in the Act, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*, all contain provisions which prohibit false or misleading representations.

Associations must also exercise caution in imposing restrictions or prohibitions on ~~advertising conducted by its members. For example, an association sometimes, in its guidelines or rules, restricts~~ the type, amount or manner in which members ~~may or may not~~ conduct their advertising. Such restrictions should be examined to determine if they would restrict ~~a~~ member's ability to compete in a market.

move apostrophe here

Insert: to the extent that it would violate the Act.

3.7 Self-Regulation, Voluntary Codes and Standard Setting Organizations

3.7.1 Self-Regulation

Many associations, especially those which govern professionals, seek to put in place rules and regulations for their members. These rules and regulations can take many forms such as by-laws, policies, procedures and the setting of standards. Often these regulations are ~~intended~~ to protect consumers, ~~and~~ to ensure standards of service delivery. It is recognized that some forms of regulations, such as social and ethical regulations, are often desirable. However, there is a risk that regulations can ~~have a negative impact on competition.~~

Insert: result in a substantial reduction in competition contrary to the Act.

Insert: or establish minimum standards of professional capability

Restrictions imposed by self-regulated associations that could raise concerns include

Insert: if they lead to a substantial reduction in competition

restrictions on entry into the market, such as barriers to accreditation and movement of members, restrictions on business structures, mandatory or "suggested" fee schedules, advertising restrictions and restrictions on types of practice such as limits on office location, size, minimum services and equipment.

Insert: avoid raising issues under the Act:

Should regulations be necessary, the Bureau suggests the following ~~six~~ guiding principles to assist in the development of efficient regulation that is likely to ~~maximize consumer welfare.~~[26]

- An association's regulations should be clear and effectively address legitimate concerns without unnecessarily restricting competition.
- Restrictions should be directly linked to clear and verifiable outcomes.
- The regulation should be the minimum necessary to achieve stated objectives. That is, the regulation should only comprise what is reasonably required to protect the public and should not restrict competition any more than is necessary to achieve the desired objectives.
- The regulatory environment should neither favour nor constrain the ability of particular market participants to compete in the market.
- The regulatory process must be impartial and not self-serving.
- A regulatory scheme would also allow for periodic assessment of the regulations' effectiveness and be subject to regular reviews.

Insert: Regulators should subject proposed regulations to a "competition assessment" to

Finally, a primary objective of the regulatory framework should be to promote open and effective competitive markets.

Insert: if they have

Insert: limit

~~To~~ determine ~~whether regulation has~~ the potential to ~~negatively impact on~~ competition~~,~~ ~~regulators should subject it to a competition assessment.~~ To help identify and measure this impact, the Organisation for Economic Co-operation and Development ("OECD") developed a toolkit and guidance document for competition assessment.[27] When developing and implementing regulations, associations should determine ~~if~~ the proposed regulation:

Insert: in a manner proscribed by the Act.

Insert: whether, and the extent to which,

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[26] "*Self-regulated professions-Balancing Competition and Regulation*", supra, note 4.

[27] See OECD, *Competition Assessment: Brief for Policy Officials, February 9, 2007, Competition Assessment: Guidance*, February 8, 2007, and *Integrating Competition Assessment into Regulatory Impact Analysis*, February 8, 2007.

- limits the number or range of suppliers; this is likely to be the case if the proposal, among other things, grants exclusive rights for a supplier to provide goods and services, establishes a license, permit or authorization process as a requirement of operation or significantly raises cost of entry or exit by a supplier;

- limits the ability of suppliers to compete; this is likely to be the case if the proposal, among other things, controls or substantially influences the prices for goods or services, limits freedom of suppliers to advertise or otherwise market their goods or services, or sets standards for product quality that provide an advantage to some suppliers over others or that are above the level that many well-informed customers would want; or

- reduces the incentive of suppliers to compete vigorously; this may be the case if the proposal, among other things, requires or encourages information on company outputs, prices, sales or costs to be published or exempts the activity of a particular industry or group of companies from the operation of general competition law.

In the event an association develops and implements rules and/or regulations which appear to raise issues under the Act, the Bureau will assess whether the regulated conduct doctrine ("RCD") applies. The RCD, which has been developed through various court decisions, helps to reconcile conflicts between the Act and conduct regulated by another law. The Bureau's updated technical bulletin on RCD[28] outlines the Bureau's general approach to the enforcement of the Act with respect to conduct that may be regulated by another federal, provincial or municipal law or legislative regime.

Insert: views of the RCD and its

3.7.2 Voluntary Codes (Codes of Conduct)

In addition to the above noted regulations, associations may put in place voluntary codes. Voluntary codes (also known as codes of conduct, codes of practice, voluntary initiatives, guidelines and non-regulatory agreements) are codes of practice and other arrangements that influence, shape, control or set benchmarks for behaviour in the marketplace. Associations may be involved in the design and implementation of such codes. Such codes can also serve as a sign to consumers that the organization's product, service or activity meets certain standards. Voluntary codes are also a recognized means of achieving public-interest goals. Many industries have adopted codes as part of their commitment to fair dealings with consumers or other objectives.

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[28] See www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02141e.html .

Voluntary codes are beneficial in that they establish benchmarks for responsible behaviour, address industry-specific problems or needs, promote a high standard of professionalism, and convey a positive image to the public. They also improve relations with the public or government and lessen the need for government intervention, regulation and litigation.

Voluntary codes which do not create competition concerns are characterized by the explicit commitment of the leadership, acceptance by members, a clear statement of objectives, expectations and responsibilities, transparency in development and implementation, regular flow of information, effective, transparent dispute resolution and meaningful inducements to participate. The key is to ensure that the codes are voluntary and achieve the objectives of the association only through the willing cooperation of members.

However, voluntary codes that speak to prices that members charge for services, mandate levels or types of services or restrict member advertising may raise competition issues. While associations may feel compelled to put in place voluntary codes for their members, they should be aware of the potential impact that such policies may have on the competitive aspects of their members' activities. For example, voluntary codes should not be used in a way that could [substantially reduce competition, prevent non-participating firms from entering the market, or negatively affect consumers by significantly raising prices or limiting product choice. Likewise voluntary codes that encourage or mandate certain prices or fees, prescribe levels of service, restrict advertising or impose association membership criteria (i.e. the exclusion or expulsion of members) could ~~be viewed as forms of anti-competitive agreements~~.

Insert: - see the CBA Section's comments]

Insert: raise issues under the Act provided that they have the requisite negative impact on competition

3.7.3 Standard Setting Organizations

Standard Setting Organizations ("SSO") are associations that develop industry standards to enhance safety, quality, and functional uniformity and ultimately increase market efficiency. SSO's should take precautions when evaluating and adopting a standard to ensure that the standard is reasonably related to the goals it is intended to achieve and is not more extensive than necessary to accomplish these goals. SSO's may ~~violate~~ the Act ~~when~~ the purpose of a standard is to restrict competition, restrict entry into the industry, deter innovation, or otherwise inhibit the ability of non-participants to compete. In some instances, standards may be developed around intellectual property rights, such as a patent. Associations should [generally avoid] adopting standards that require members to gain access to intellectual property controlled by certain members of the association. Individual SSO members should also disclose any proprietary interest that they may have in a particular standard before the association adopts the standard.[29]

Insert: In order to avoid possible violations of the Act,

Insert: if

Inert: raise issues under

Insert: [or effect]

Insert: restrict the ability of the marketplace to determine which standard will be successful,

Insert: - see the CBA Section's comments.

[29] For more information on the treatment of Intellectual Property Rights under the Act see the *Intellectual Property Enforcement Guidelines* at www.competitionbureau.gc.ca/internet/index.cfm?itemID=1286&lg=e.

Part 4: Best Practices

4.1 Compliance Programs

Corporate compliance programs assist companies in minimizing the risk of violating the Act. A credible and effective compliance program can also serve a number of purposes for an association, including informing the association and its members about the content of the Act as it affects the association's activities, identifying the boundaries of permissible conduct, identifying situations where it would be advisable to seek legal advice, and encouraging innovative and pro-competitive activities. The primary objectives of a credible and effective compliance program are to prevent or detect misconduct by an association. Strict codes of ethics and conduct may allow an association to avoid improper actions and avoid being a conduit for illegal activities. For more information on corporate compliance programs and the measures that an association and its members can take to prevent or minimize the risk of violating the law, please refer to the Bureau's *Information Bulletin on Corporate Compliance Programs*.[30]

4.2 Guidelines

[Note: The CBA Section proposes that this sentence be replaced with a more robust statement emphasizing that these guidelines are meant to be adapted to a trade association's specific circumstances. See the text of the Section's comments.]

A non-exhaustive list of guidelines which associations and their members can follow in order to avoid raising potential concerns under the Act are:

General

Educate members and staff on the provisions of the *Competition Act* that ~~would~~ [Insert: could] have a direct effect on association activities.

Put in place a Compliance Program, which ~~would~~ [Insert: could] include appointing a Compliance Officer. [Note: See the CBA Section's comments.]

Exercise caution in the formulation and implementation of guidelines in relation to any important competitive aspect of their members' business activities.

Implement clear guidelines on association activities. [Note: See the CBA Section's comments.]

Make the board sufficiently diverse so as to minimize the risk of competition law violations. It is preferable if an association's board of directors include more than competitors. [Note: See the CBA Section's comments.]

Information Sharing and Data Collection

Obtain legal advice on sensitive issues such as data collection and exchange, standard-setting or joint activities in the marketplace.

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[30] Available online at www.competitionbureau.gc.ca.

Avoid discussing current or future prices, costs, output levels, market allocations, business plans or bids.
Base information exchanges on historical, aggregated data.
~~The more generalized the information, the lower the risk of an anti-competitive effect.~~
Do not exchange competing members' individual price lists and information about particular member transactions.
~~Use~~ an independent third party to conduct the information gathering and collation.
Collect data in a way that preserves the anonymity of members.
Ensure that participation in any information exchange is voluntary.

Insert: Where appropriate, consider using

Agendas & Meetings

Insert: or social encounters

Adhere to clear agendas and record the minutes of the meetings.
Review minutes of association meetings and report any errors.
Note the arrivals and departures of members in the minutes.
Do not use association meetings to discuss future prices, business strategies or comment on specific competitive activities of members.
Avoid private meetings between competitors where sensitive competitive information is discussed.
Allow all members to attend meetings so as not to exclude a specific group or segment. [Note: See the CBA Section's comments.]
Establish and adhere to a document retention policy.
When in doubt, seek legal advice about the activities being proposed or discussed.

Membership

Insert: If feasible, provide reasons to

Have clear membership criteria that are not arbitrary and based on the legitimate objectives of the association~~;~~ Insert: .
~~For those~~ applicants who are not granted membership ~~into an association give them reasons for refusal and allow an appeal process~~. [Note: See the CBA Section's comments.]

Sanctions/Discipline

~~Do not impose sanctions aimed at inducing members to follow association recommendations that, if carried out, would have an anti-competitive effect.~~

Insert: Consider whether the imposition of sanctions aimed at industry members to follow specific association recommendations could have a substantial anticompetitive effect.

Self-Regulation

Insert: Consider the impact of regulations on competition.

Ensure that regulations are related to the legitimate purpose of the self-regulating program.
Ensure that regulations are impartially administered.
Consult legal counsel prior to implementing regulations.

Voluntary Codes

Ensure that voluntary codes have the explicit commitment of the association leaders. [Note: See the CBA Section's comments.]
Ensure that voluntary codes include a clear statement of objectives and expectations.
Ensure open consultation in the development and implementation of the code and ensure that the process for designing and implementing such codes be transparent.

Fee Guidelines

Fee guidelines must clearly indicate that they are provided for information purposes only and are not intended to indicate the minimum level of acceptable fees.
In conducting fee surveys for the purpose of implementing a guideline, use an independent third party to conduct the information gathering and collation.
In conducting fee surveys, ask respondents what fees, on average, they have charged over the period as opposed to what fees are acceptable or desirable.
Do not use fee guidelines to induce members to move to the highest price recorded in the guideline.
Do not impose sanctions on members who choose not to follow association fee guidelines.

Legal Counsel's Role

[Note: See the CBA Section's comments.]

Ensure that legal counsel approve the agenda or minutes of any association meeting.
Have legal counsel actively participate in association meetings.
Ensure that association by-laws are reviewed by counsel.

[Note: See the CBA Section's comments.]

Finally, should an association discover that it was involved in activities that may violate

the criminal or penal provisions of the Act it can, in certain circumstances, approach the Bureau and request immunity from prosecution in return for co-operating with the Bureau's investigation and any ensuing prosecutions. The Immunity Program[31] seeks to uncover and stop criminal anti-competitive activity prohibited by the Act and to deter others from engaging in similar behaviour.

Part 5: Binding Written Opinions Program

Insert: that

Under section 124.1 of the Act, the Commissioner may provide a binding written opinion on whether a proposed conduct or practice would raise an issue under the Act. A binding opinion takes into account material facts provided by the applicant, jurisprudence, previous opinions and the stated policies of the Bureau. If an association is concerned about a proposed activity, it can seek a binding written opinion regarding the application of the Act to conduct. The written opinion remains binding for as long as the material facts on which the opinion was based remain substantially unchanged and the conduct or activity is carried out substantially as proposed.[32]

Insert: The Bureau will charge a fee of X for providing such an opinion. [Note: See the CBA Section's comments.]

[31] For more information please see *Immunity Program under the Competition Act* (Ottawa, Industry Canada, October 2007) at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02483e.html

[32] For more information on binding written opinions, including the Bureau's fees and service standards for the preparation of such opinions, please see *Competition Bureau Fee and Service Standards Policy* (Ottawa: Industry Canada, March 2003) available online at www.competitionbureau.gc.ca.

APPENDIX I

[Note: See the CBA Section's comments.]

Insert: cases relating to

This appendix provides a brief summary of three decisions rendered by various courts under the conspiracy provisions of the *Competition Act* (or its predecessor, the *Combines Investigation Act*). The summary of cases illustrates how associations can become involved in anti-competitive acts.

The Kent County Law Association

Ontario Supreme Court

R. v. Kent County Law Assn. (1988), O.J. No 2965 (QL)

Key Facts

Insert: Parties to the Order

Participants: Kent County Law Association and Individual Members of the Executive ("Association")

Insert: Conduct

Time Frame of Conspiracy: Between May 23, 1984 and April 29, 1987

Product Market: Residential real estate legal services

Geographic Market: Within the County of Kent and environs of the Province of Ontario

Prohibition Order: January 14, 1988

Trade Association Activity and Conspiracy

In 1983, this Association comprised of lawyers published a fee schedule for legal services in respect of residential real estate matters.

As a result of widespread incidents of pricing by members below the fees listed, at a meeting of the Association on June 4, 1984, attended by approximately 80 per cent of its members, a motion of agreement was unanimously passed to adhere to the 1983 suggested fee schedule of the Association.

Subsequently, a letter was sent out to each member of the Association requesting that members report to the Executive any violation of the agreement described above. Enclosed with the letter was an acknowledgement for the signature of the member which stated in part "I agree with the 1983 Kent Law Association Fee Schedule....."

In October 1984, another letter was sent to each member of the Association, enclosing a proposed residential real estate fee schedule as well as an undertaking for the signature of the member which stated in part "...The undersigned further agrees to charge fees only in accordance with the aforementioned fee schedule." The above proposed fee schedule was approved at an Association meeting held on October 22, 1984.

At that same meeting, the members in attendance approved an unprofessional conduct by-law. The by-law specifically included, as grounds for a finding of unprofessional conduct, failing to sign an Agreement form agreeing to follow and apply any Fee Schedule of the Association or failing to follow and apply any such schedule.

The Directors were empowered to impose on any member that they were satisfied had been guilty of unprofessional conduct any such sanction as they saw fit, such as imposing a fine, suspending for a designated period of time, the member's privileges of the Association or terminating such member's membership in the Association.

When the Association became aware in January 1985 that the above information had been passed to the "Combines Investigation Branch of the Federal Department of Justice" and that the department had taken the position that the Association's action was in breach of the *Combines Investigation Act*, a letter was sent to members informing them that the recently passed fee schedule would only be a suggested one.

However, the Executive of the Association was aware that a significant number of members in the Association continued to charge fees for residential real estate legal services in accordance with the fee levels for such services contained in the fee schedules and took no steps to avoid such uniform conduct on the part of the membership. This continued until April 29, 1987.

[Note; Why is this a problem if the fees were only suggested?]

Order (Highlights)

The order prohibited the parties from:

engaging in any conduct directed towards the commission of conspiracy offences under the *Competition Act* in the supply of residential real estate legal services within the County of Kent and environs in the Province of Ontario;

fixing, establishing, enforcing, administering or directing the fees at which the Association supply legal services, whether through the use of fee schedules, suggested or otherwise;

taking any measure to cause, or attempt to cause, any person to adhere to the fees so fixed, enforced, administered or directed;

for a period of 10 years from the date of the Order, publishing any schedule of fees for legal services and communicating to one another by any method the legal fees that members have charged, are charging or plan to charge clients, save for those communications appropriate to the day to day operation of a law practice.

The order also directed the parties to, among other things:

for a period of five years from the date of the Order, provide to the Director of Investigation and Research notice of and agendas for all general and special membership meetings at which the subject of legal fees will be raised and permit such person or his representative to attend such meetings.

Canadian Real Estate Case

Insert: Prohibition Order

Federal Court Trial Division

R v. Chambre D'Immeuble du Saguenay-Lac St. Jean Inc. (1988), 23 C.P.R. (3d) 204 (F.C.T.D.)

Key Facts

Participants: Chambre D'Immeuble du Saguenay-Lac St-Jean Inc.
Chambre D'Immeuble de Québec
Chambre D'Immeuble de Montréal
Chambre D'Immeuble de l'Outaouais Inc.
Association of Regina Realtors Inc.
Calgary Real Estate Board Co-op Ltd.
Fraser Valley Real Estate Board
Windsor-Essex County Real Estate Board
London and St. Thomas Real Estate Board
The Canadian Real Estate Association

Insert: Parties to the Order

Insert: Conduct

Time Frame of Conspiracy: As early as March 19, 1982 and as late as December 6, 1988

Product Market: Real estate brokerage services

Geographic Markets: Saguenay-Lac St. Jean, Québec city, Montreal, Outaouais area, Regina, Calgary, Fraser River valley area, Windsor and the County of Essex,

London and St. Thomas

Prohibition Order: December 20, 1988

Trade Association Activities ~~and Conspiracy~~

In 1988, the Canadian Real Estate Association ("CREA") was comprised of over 100 regional Real Estate Board members. Being a member of CREA allowed each area board access to the Multiple Listing System ("MLS") which was an information exchange system in which all the details of the real estate and accompanying personal property were gathered and circulated to all brokers. In order for a broker to get access to the MLS, he or she had to be a member of an area board and had to adhere to certain rules and regulations.

Insert: were considered by the Bureau to

A number of rules and regulations adopted by various boards ~~and deemed to~~ be anti-competitive ~~fell into four basic categories~~:

Efforts to standardize the commission rates for MLS and exclusive listings by influencing the price at which a commission was set.

Restrictions placed on the advertising of discounted commission rates and other advertising restrictions such as not advertising "For Sale by Owner" consulting services and restrictions on what could be advertised on business cards (only real estate related services could be advertised on such cards).

Restrictions placed on the offering of inducements or incentives by members to encourage vendors to list a property with a particular broker or firm. The rules and regulations of a particular board stated that the offering of any incentive to the public to list or purchase property by a member, unless approved by that board, was prohibited. Another board implemented a rule that stated that members of its board could not offer inducements such as gifts, refunds or prizes, to list or purchase.

Unwarranted requirements for membership in the boards by implementing rules such as not being approved in a particular board unless the applicant undertook to carry on a full time business or occupation of trading in real estate and directly related services. Another board implemented a rule that no person would be admitted as a member of that board if that person engaged in additional employment which could interfere with his ability to service his clients, purchasers or others engaged in the real estate business. The rule also stipulated that to be a member of the board, a person would have to maintain full-time employment in the real estate business. Another board also applied a similar rule.

[Note: Why is this considered to be anticompetitive?]

Order (Highlights)

The order prohibited CREA and each of its member boards and associations from:

> engaging in any conduct directed towards the commission of conspiracy and price-maintenance offences under the *Competition Act* in the supply of real estate brokerage services;
>
> fixing, establishing or maintaining in any manner commission rates or fees for MLS or other listings to be offered by members of boards or non-members;
> attempting to control entry into the industry by setting, as a condition of membership, for brokers or salespersons, the obligation to work full time in real estate sales or related industries;
>
> attempting to control the advertising activities of board members or non-members by recommending the type of advertising to be accepted by individual suppliers of advertising services;
>
> attempting to fix prices for real estate brokerage services;
>
> discouraging the offering of listing incentives such as gifts, refunds or prizes;
>
> discouraging the offering or advertising of "For-Sale-by-Owner" or other similar consultation services;
>
> discouraging members from co-operating with non-members on MLS or exclusive listings.

[Note: Refer to the expiry of the Order.]

<u>Alberta Ambulance Operators' Association</u>

Alberta Court of Queen's Bench

R. v. Alberta Ambulance Operators' Association (January 23, 1995), (Alta. Q.B.) (unreported)

Key Facts

Participants: The Alberta Ambulance Operators' Association and certain Directors ("Association")

Time Frame of Conspiracy: Between July 3, 1984 and October 18, 1991

Product Market: Inter-hospital transfer services

Geographic Market: Across the province of Alberta

Prohibition Order: January 23, 1995

Trade Association Activities and Conspiracy

The Association put in place a number of rules and procedures in a Code of Ethics and disciplinary guidelines. These rules and procedures were approved by the membership at a general meeting and subsequently passed by the Association.
According to the Agreed Statement of Facts, the principal elements of the agreement provided that:

> no member was to seek to displace another member by offering the same level of service at a lesser charge than that other member;
>
> no Association member was to establish or endeavour to establish an ambulance service in direct competition with another member established in an area unless that other member so agreed;
>
> it was the policy of the Association not to admit any new member who was starting an ambulance service in an area where an existing member was currently operating;
>
> non-members of the Association would be charged $1,000 for a two year ambulance inspection while Association members would not be charged a fee for such service;
>
> inspections of ambulance services would be limited to Association members or to non-members who were planning to operate in an area where there was not an Association member already operating.

Order (Highlights)

The Order prohibited the Association from:

> committing an offence under section 45 of the *Competition Act* in the supply of ambulance services in the Province of Alberta;
>
> fixing, establishing or maintaining the prices charged by any ambulance operator, or the amount of subsidies or other compensation to be received by any ambulance operator

from customers, in respect of the provision of ambulance services;

preventing or discouraging any ambulance operator from offering services to any customer in Canada or within any geographic area in Canada;

interfering in any way with the right of any person to seek and/or obtain employment with any ambulance operator in accordance with employment and/or professional standards established pursuant to federal, provincial or municipal statutes, regulations or by-laws;

preventing or discouraging any insurer from offering any services or benefits, including direct billing privileges, to any ambulance operator;

refusing membership to, or terminating membership of, or discriminating against, any ambulance operator on the basis that ambulance operator competes, might compete with another ambulance operator;

refusing membership to, or terminating membership of, an ambulance operator, unless the ambulance operator fails to meet lawful and non-discriminatory membership criteria codified within the by-laws or rules of the Ambulance Association.

Certain Directors were prohibited from:

serving as a director, committee member or employee of the Ambulance Association, or acting in any capacity on behalf of the Ambulance Association in respect of the development, administration or enforcement of any by-laws rules, regulations, policies or procedures.

The Ambulance Association was specifically ordered to:

amend its by-laws, rules, regulations, policies and procedures to conform with the Order;

provide a copy of the Order and Agreed Statement of Facts to each ambulance operator who was a member of the Ambulance Association or who had been a member of the Association between July 3, 1984 to October 18, 1991 and other persons listed in the order.

The Order was in effect for a period of 10 years following the date of the Order.

Fine

A fine of $25,000 was imposed on the Association, of which $5,000 was to be paid by each of the three individuals named as Respondents.

Appendix II

4. (1) Nothing in this Act applies in respect of

(a) combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees;

(b) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen; or

(c) contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

(2) Nothing in this section exempts from the application of any provision of this Act a contract, agreement or arrangement entered into by an employer to withhold any product from any person, or to refrain from acquiring from any person any product other than the services of workmen or employees.
R.S., c. C-23, s. 4; 1974-75-76, c. 76, s. 2.

45. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

(2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

(3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

(a) the exchange of statistics;

(b) the defining of product standards;

(c) the exchange of credit information;

(d) the definition of terminology used in a trade, industry or profession;

(e) cooperation in research and development;

(f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;

(g) the sizes or shapes of the containers in which an article is packaged;

(h) the adoption of the metric system of weights and measures; or

(i) measures to protect the environment.

(4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

(a) prices,

(b) quantity or quality of production,

(c) markets or customers, or

(d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

Exception

(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]

(7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

(a) in the practice of a trade or profession relating to the service; or

(b) in the collection and dissemination of information relating to the service.

(7.1) Subsection (1) does not apply in respect of an agreement or arrangement between federal financial institutions that is described in subsection 49(1).

(8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.
R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714.

47. (1) In this section, “bid-rigging” means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate.
R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33.

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or

misleading in a material respect.

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.
R.S., 1985, c. C-34, s. 52; 1999, c. 2, s. 12.

61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(a) the same corporation, partnership or sole proprietorship, or

(b) corporations, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a

resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.
(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

(10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

R.S., 1985, c. C-34, s. 61; R.S., 1985, c. 19 (2nd Supp.), s. 36; 1990, c. 37, s. 30; 1999, c. 31, s. 51(F).

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the

representation, as the case may be.

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as t he case may be.

(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

(a) the price at which products have been or are supplied; or

(b) the price at which products will be supplied.

(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
1999, c. 2, s. 22.

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1.

77. (1) For the purposes of this section,

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).
Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.
R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any

area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.
Administrative monetary penalty

(3.1) Where the Tribunal makes an order under subsection (1) or (2) against an entity who operates a domestic service, as defined in subsection 55(1) of the Canada Transportation Act, it may also order the entity to pay, in such manner as the Tribunal may specify, an administrative monetary penalty in an amount not greater than $15 million.

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account the following:

(a) the frequency and duration of the practice;

(b) the vulnerability of the class of persons adversely affected by the practice;

(c) injury to competition in the relevant market;

(d) the history of compliance with this Act by the entity; and

(e) any other relevant factor.

(3.3) The purpose of an order under subsection (3.1) is to promote practices that are in conformity with this section, not to punish.

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

U.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4.

Canada