



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Bulletin du Bureau de la concurrence : *Communication pendant les enquêtes*

**SECTION NATIONALE DU DROIT DE LA CONCURRENCE
ASSOCIATION DU BARREAU CANADIEN**

Décembre 2013

AVANT-PROPOS

L'Association du Barreau canadien est une association nationale qui regroupe plus de 37 500 juristes, dont des avocats, des notaires, des professeurs de droit et des étudiants en droit dans l'ensemble du Canada. Les principaux objectifs de l'Association comprennent l'amélioration du droit et de l'administration de la justice.

Le présent mémoire a été préparé par la Section nationale du droit de la concurrence de l'Association du Barreau canadien, avec l'aide de la Direction de la législation et de la réforme du droit du bureau national. Ce mémoire a été examiné par le Comité de la législation et de la réforme du droit et approuvé à titre de déclaration publique de la Section nationale du droit de la concurrence de l'Association du Barreau canadien.

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I. INTRODUCTION

La Section nationale du droit de la concurrence de l'Association du Barreau canadien (la Section de l'ABC) est heureuse de pouvoir présenter ses commentaires sur la version préliminaire du bulletin d'information du Bureau de la concurrence : « *Communication pendant les enquêtes* » (la version préliminaire du bulletin). La Section de l'ABC félicite le Bureau de sa décision de fournir des directives sur ce sujet, d'autant plus que le Bureau recourt davantage à l'article 11 de la *Loi sur la concurrence* pour recueillir des renseignements au cours d'enquêtes officielles réalisées en vertu des dispositions civiles de la *Loi* qui ne portent pas sur les fusions.

II. GENERAL COMMENTS

As a general matter, the CBA Section believes the Bureau should explain how it intends the Draft Bulletin to interact with the existing *Conformity Continuum Information Bulletin*. It would be helpful for the Bureau to confirm whether the Draft Bulletin is intended to supplement the guidance in the *Conformity Continuum Information Bulletin* on the Bureau's general enforcement approach.

III. COMMUNICATION WITH PARTIES

A. General principles

The Bureau sets out general principles in section 2 of the Draft Bulletin:

Provided that doing so could not adversely affect the Commissioner [of Competition]'s discretion or compromise an investigation, the Bureau is committed to ensuring that parties are notified, as early as is appropriate, of:

- the commencement or discontinuance of an Inquiry;
- the provisions of the Act to which the Inquiry relates;
- the general nature of the conduct being inquired into; and
- the Case Officer at the Bureau that may be contacted with respect to the Inquiry.

The CBA Section agrees that these are key principles. However, the articulation (here, and in subsequent sections of the Draft Bulletin) should be expanded to underscore the Bureau's commitment to transparency wherever possible and at the earliest possible opportunity. The CBA Section suggests:

- expanding or supplementing the third bullet to make it clear that disclosure will, as early as possible, extend beyond the “general nature of the conduct being inquired into” and provide, again as early as possible, details about the subject of the inquiry necessary for parties to understand and seek to address the underlying issues; and
- noting in the surrounding discussion that for civil investigations, concerns about affecting the Commissioner's discretion and investigation are less likely to arise, making disclosure of the Inquiry more routine.

For the first suggestion, the CBA Section believes that the Bureau should disclose its “theory(ies) of the case” (*i.e.*, how the conduct fits in the statute and the key factual underpinnings that inform the Bureau's theory) as early as possible, to allow the subject of the inquiry to provide relevant information and to encourage meaningful discussions and negotiations.¹ This can be especially important where the Bureau is considering whether the alleged activity should be examined under the criminal or civil provisions, as it would allow parties to provide relevant information, data and documents to assist in making this determination. Where parties do not have a real understanding of the Bureau's concerns, they may be unable to provide the type of information most helpful to the Bureau.

The CBA Section recognizes that, in providing disclosure on its theory of the case, the Bureau will need to consider the applicability of section 29 of the Act to the disclosed information. However, a variety of practical mechanisms could ensure meaningful disclosure while maintaining appropriate and reasonable confidentiality protections. For example, the Bureau could provide a useful summary of key evidence while maintaining the anonymity of the source of that evidence. Other mechanisms could achieve this balance, like confidentiality undertakings from counsel, which are often used in Competition Tribunal proceedings.

Section 2 of the Draft Bulletin also acknowledges the right of parties to obtain certain information about an inquiry at various stages of the process. This includes the right “to be

¹ For inquiries commenced pursuant to paragraph 10(1)(b) of the Act, disclosure of the Bureau's theory(ies) of the case is facilitated by the fact that the Bureau would have to have considered potential theories in the context of the Commissioner's determination as to whether he has the “reason to believe” necessary to commence a paragraph 10(1)(b) inquiry.

informed as to the progress of the inquiry” on written request, under subsection 10(2) of the Act. The Draft Bulletin does not, however, provide substantive content on the Bureau’s obligation under subsection 10(2), and is silent on procedural mechanisms to guide implementation. Discharging the legal obligation in subsection 10(2), and achieving the Commissioner’s stated goal of transparency, is best achieved by establishing and adhering to procedures (whether formally, or through best practices) that promote the meaningful discharge of the Commissioner’s obligation in every inquiry. These procedures (or best practices) could address topics such as:

- the evidentiary threshold for the Commissioner in determining whether there is the “reason to believe” necessary to commence an inquiry pursuant to paragraph 10(1)(b) of the Act;
- the Bureau’s commitment to:
 - informing parties of the particulars of the subject of an inquiry at an early stage, and as the inquiry progresses, including the theory(ies) of harm the Bureau is investigating; and
 - open and frank dialogue between the Bureau’s review team (including economists) and the parties about the substantive nature of an inquiry, the Bureau’s theory(ies) of competitive harm, and the quality and probative value of the evidence in the Bureau’s possession (including economic and econometric analyses prepared by or for the Bureau);
- the procedure to be adhered to by the Bureau in determining whether it has sufficient evidence to take enforcement action under the Act, or to refer a criminal matter to the Director of Public Prosecutions (DPP); and
- the Bureau’s commitment to, and processes used to, explore whether settlement is appropriate, and to verify that the settlement sought by the Bureau is proportional to the substantive competition law concerns is identified in the course of its inquiry (in the sense that the commitments made legally binding in any settlement with the Bureau address and do not go beyond the Bureau’s identified competition concerns).²

The CBA Section strongly endorses the Bureau’s recognition in the Draft Bulletin that “dialogue with parties generally facilitates resolutions and helps to avoid protracted litigation,” and believes our suggestions on disclosure to parties would contribute to this objective.

² For discussion of many of these principles in the context of competition law investigations and enforcement, see, e.g., 2012 report of the OECD Competition Committee entitled *Procedural Fairness and Transparency* (available at www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm) and 2013 report of the ICN Agency Effectiveness Project on Investigative Process, entitled *Competition Agency Transparency Practices* (available at www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx).

B. Notice of Commencement and Discontinuance of Inquiries

The CBA Section believes that sections 2.1.1 and 2.2.1 of the Draft Bulletin should indicate the types of circumstances in which the Bureau would not give parties prior notice of an inquiry, and how frequently this is expected to occur. Section 2.1.1 should make it clear that parties will be notified immediately of any decision by the Bureau to refer a matter to the DPP, so the parties can make representations prior to a DPP decision on whether charges should be laid.

Section 2.2.2 of the Draft Bulletin states that it may be appropriate in some circumstances to commence proceedings without an opportunity to discuss resolution in advance. Given the desirability of negotiated outcomes (rather than litigation) in the vast majority of cases, and the serious consequences (reputational and otherwise) of being named a respondent or defendant in formal proceedings, the CBA Section believes that the Bureau should commence proceedings without first seeking to resolve its concerns only in very exceptional circumstances.³ The CBA Section also believes that where the Bureau has decided to commence proceedings, particularly civil proceedings, the practice should be to notify the party in advance of any public communication from the Bureau.

The CBA Section also recommends that Sections 2.1.2 and 2.2.2 of the Draft Bulletin state that parties will be notified “promptly” of a decision to discontinue an inquiry under section 22 of the Act.

C. Periodic Communications on Status of Inquiry

Sections 2.1.1 and 2.2.1 of the Draft Bulletin indicate that “the Bureau will ordinarily attempt to contact parties approximately every six months to confirm that the Inquiry is ongoing” in cases where there is no other communication.

The CBA Section believes that a shorter time, perhaps three or four months, would be more appropriate. It would also be helpful for the Bureau to indicate circumstances where it may be appropriate to deviate from this timeframe and provide updates either more or less frequently.

³ We assume that, as stated in the Conformity Continuum Information Bulletin, parties would normally be informed of the inquiry and given an opportunity to resolve the Commissioner's concerns in advance. It would be worthwhile noting this consistency between the two bulletins.

Given that section 10(2) specifically allows the party under inquiry to seek an update on the “progress of the inquiry”, the CBA Section also believes the Bureau should provide a substantive status update whenever reasonably requested by the parties under inquiry, including a summary of what has transpired since the last communication, and whether there are any new issues or issues that are no longer of concern.

IV. COMMUNICATION WITH OTHER STAKEHOLDERS

A. Communication with Industry Participants

Section 3.1 of the Draft Bulletin addresses communications with industry participants who may have information relevant to an inquiry.

The CBA Section recognizes that it may be necessary for the Bureau to disclose information about an inquiry to a third party stakeholder to obtain relevant information from that stakeholder. At the same time, subsection 10(3) of the Act is clear that inquiries “shall” be conducted in private, and section 29 protects the confidentiality of information provided to the Bureau under the Act. Accordingly, the Draft Bulletin should be explicit that the Bureau will disclose to the third party only the information necessary for the third party to provide the information the Bureau needs for its inquiry. This approach is consistent with the *Information Bulletin on the Communication of Confidential Information under the Competition Act*.⁴

B. Communications to General Public

Section 3.3 of the Draft Bulletin states that “[w]here a matter has become known to the general public, the Bureau may confirm that it has an ongoing inquiry.”

⁴ See *Information Bulletin on the Communication of Confidential Information*:

[The Bureau] remains vigilant to avoid communicating confidential information when dealing with matters under the Act, unless such communication is permitted under section 29 of the Act or other statutory provisions pertaining to confidentiality and, even when permitted, considers whether disclosure is, in the circumstances, advisable or necessary. In other words, the general policy of the Bureau is one of minimizing the extent to which confidential information is communicated to other parties” (paragraph 1.4, emphasis added)

...

... communication of confidential information for the purposes of administration or enforcement of the Act may occur ... when eliciting information from market participants, such as customers, suppliers or competitors, that may be used as evidence to determine whether the Bureau’s or a third party’s assessment of a matter is accurate. In such situations, care is taken to refrain from, or to minimize, the communication of confidential information” (paragraph 4.2.1.2, emphasis added).

In the CBA Section's view, only where the party subject to the inquiry has made the existence of the inquiry known to the public, would it be appropriate for the Bureau to confirm its existence. Otherwise, the Bureau should refrain from commenting.

Given the discussion of communications with the general public in Section 3.3 of the Draft Bulletin, the CBA Section suggests removing the "Inquiry Communication with Public Stakeholders" portions of Figures 1 and 2. Inclusion in these Figures is unnecessary and confusing.

C. Bureau Announcements, Position Statements, Guidelines and Bulletins

Sections 3.3.1, 3.3.2 and 3.3.3 recognize the benefits of the various public communications made by the Bureau. While these communications may involve inquiries, the issues seem to relate more generally to section 29 of the Act. As such, much of these sections of the Draft Bulletin may be better suited to other documents, or if included in the Draft Bulletin, should be repeated in those documents (such as the *Information Bulletin on the Communication of Confidential Information under the Competition Act* – even though only a single paragraph of that bulletin, paragraph 4.2.1.4, is dedicated to this issue), or to more general guidance on the Bureau's approach to educating the public about its work (such as an updated Conformity Continuum Information Bulletin).

V. ATTENDANCE RIGHTS – SUBSECTION 12(4)

Absent from the Draft Bulletin is guidance on the Bureau's position on subsection 12(4) of the Act, which sets out the rights of a person who is the subject of an inquiry to attend an examination.

Given the Bureau's stated intention to place greater reliance on section 11 of the Act, the Draft Bulletin should set out the Bureau's views on a party's attendance rights under subsection 12(4) of the Act and, in particular, the circumstances where it will oppose a party's right to attend examinations.

VI. CONCLUSION

We hope our submission will be of assistance. If the Bureau would like to discuss our comments in more detail, we would be pleased to do so at the Bureau's convenience.