



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
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Competition Bureau: Potential Advocacy Initiatives

**NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,500 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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Competition Bureau: Potential Advocacy Initiatives

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) appreciates the opportunity to comment on potential advocacy initiatives of the Competition Bureau. The Commissioner of Competition has noted in a number of speeches that the Bureau's role as an advocate in regulatory settings can be an effective tool in promoting economic productivity.¹ The CBA Section agrees with this sentiment and recognizes the useful role that strategic interventions and advocacy initiatives may play in appropriate circumstances.

In this submission, the CBA Section does not suggest specific sectors or industries that should or should not be the subject of the Bureau's potential advocacy initiatives. Rather, the CBA Section makes suggestions on:

- the criteria the Bureau should apply in its potential advocacy initiatives; and
- the process the Bureau will utilize in undertaking advocacy initiatives.

The CBA Section looks forward to providing additional input to the extent that specific advocacy initiatives are contemplated and undertaken by the Bureau.

II. CRITERIA FOR BUREAU'S ADVOCACY INITIATIVES

The Bureau's call for input enunciates four strategic factors to consider in assessing potential projects:²

- Will the Bureau's efforts have clear, tangible benefits for Canadians?
- Will the Bureau be contributing in a useful way?

¹ Remarks by John Pecman, Interim Commissioner of Competition (April 5, 2013), available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03556.html.

² Canada, Competition Bureau, "Competition Bureau Seeks Input from Canadians on Potential Advocacy Initiatives" (September 10, 2013), available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03558.html.

- Does an effective forum exist for the Bureau to present its findings and is there a high level of public interest?
- Will the Bureau be able to gauge the impact of its advocacy efforts?

The CBA Section does not take issue with these criteria but would add the following points.

First, the CBA Section believes that Parliament enacted the *Competition Act* to address matters relating to competition generally, in a manner consistent with the principles in section 1.1 and elsewhere in the *Act*. The Commissioner has made it clear that “the Bureau will consistently advocate that regulators and policy makers regulate only where necessary and that they rely on market forces as much as possible to achieve the benefits of competition.”³ While recognizing that regulation may be necessary or preferable in certain circumstances from a public policy perspective, the CBA Section generally supports the approach of relying on market forces while balancing the legitimate role of regulation with the benefits of competition.⁴ The CBA Section also believes the Bureau’s advocacy role could extend beyond regulatory matters, for instance, to advocate that government should not participate, as a supplier or customer, where participation is better left to the private sector. As well, the Bureau should not limit its advocacy activities to policy makers and regulators, but extend it to the government or law makers, including the Minister of Industry, where appropriate.

Second, on the criterion regarding “clear, tangible benefits for Canadians”, we believe the Bureau should endeavour to advocate for approaches to regulation likely to provide constructive and practical outcomes and in a manner that reduces the burden of compliance on Canadian businesses. The *Competition Act* is a federal law with broad application across most sectors of the Canadian economy. As the *Act* intersects with a variety of regulatory regimes, it is important for the Bureau to work to provide a consistent framework within which Canadian businesses may operate. Examples of outcomes that ought to be avoided to the extent practical include:

- creation or exacerbation of operational conflicts (for example, where regulatory and other requirements appear compatible but, in practice, run counter or create uncertainty as to how the two regimes apply);
- unnecessary singling out of specific entities (as opposed to the creation of objective-based criteria for regulatory regimes); and

³ *Ibid.*

⁴ The Competition Section further notes that there may be substantial costs associated with transitioning from a regulatory framework to a market-based environment and vice-versa.

- establishment of a regulatory environment susceptible to over-use or abusive tactics (i.e., gaming) from potential complaining parties.

Many of these potential pitfalls could be avoided if the Bureau seeks input from affected stakeholders early in the advocacy process, as discussed below.

Third, on the criterion of whether there is “a high level of public interest”, where a potential advocacy initiative impacts only a small segment of the Canadian population, or a relatively small industry, a lack of broad-based public interest should not necessarily prevent the Bureau from playing an advocacy role. The Bureau should not allow the “public interest” to result in a “majority-rules” or populist approach to decision- and policy-making. The fact that a particular industry is small does not imply that it is not significant. The Bureau should pursue its advocacy initiatives with emphasis primarily on industries that would benefit from the advocacy process. Similarly, the fact that an industry is large does not suggest that the Bureau should play a role in the absence of other factors.

Fourth, although sections 125 and 126 of the *Competition Act* contain slightly different wording on how the Commissioner may initiate submissions in federal or provincial settings,⁵ the CBA Section believes these procedural differences should not impact how submissions are made, the substance of the submissions, or the frequency with which they are initiated. As articulated in past CBA Section submissions on the Regulated Conduct Defence,⁶ from a policy perspective there is no reason to differentiate between federal and provincial regulators, and the Bureau should approach interventions at the federal and provincial levels in a like manner.

⁵ Section 125 of the *Competition Act* allows the Commissioner to make representations and call evidence before any federal board, commission or other tribunal in respect of competition when the representations or evidence are relevant to the matter before that body or factors the body considers in determining the matter, either at the request of that body or on the Commissioner’s initiative. On direction from the Minister, the Commissioner is required to make representations or calls for evidence. In contrast, section 126 allows the Commissioner to make representations or call evidence to a provincial board, commission or other tribunal at the request of that body or on the Commissioner’s initiative with the consent of that body. The Minister cannot direct the Commissioner to intervene at the provincial level. As with representations to federal bodies, any provincial representation may only be made in respect of competition, and then only when the representations or evidence are relevant to a matter before that body or factors the body considers in determining the matter.

⁶ National Competition Law Section, Canadian Bar Association, *Draft Technical Bulletin on “Regulated” Conduct* (February 2006) at p. 5, available online: [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA_regulatedconduct-e.PDF/\\$file/CBA_regulatedconduct-e.PDF](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA_regulatedconduct-e.PDF/$file/CBA_regulatedconduct-e.PDF); National Competition Law Section, Canadian Bar Association, *Submission on the Competition Bureau Information Bulletin on the Regulated Conduct Defence* (October 2003) at p. 3, available online: www.cba.org/cba/submissions/pdf/03-40-eng.pdf.

III. PROCEDURAL ASPECTS OF BUREAU'S ADVOCACY INITIATIVES

While additional questions and issues may arise as the Bureau gains experience with its advocacy initiatives, the CBA Section has the following initial comments on the process aspects of the Bureau's potential advocacy initiatives.

First, the CBA Section encourages the Bureau to solicit voluntary input from a wide range of stakeholders when it undertakes an advocacy initiative. The types of issues that will warrant an advocacy initiative by the Bureau are likely to have an effect on a range of stakeholders. Moreover, stakeholders that are differently affected can provide a range of perspectives that should assist the Bureau in formulating its views on the advocacy initiative. In many cases, the range of stakeholders (from whom input should be sought) may be wider and the Bureau will be better able to balance competing interests in an advocacy context, as opposed to an enforcement or litigation context in which the Bureau's positions are constrained by statute, market definitions and evidentiary records. The CBA Section believes that broad stakeholder consultations on past Bureau initiatives have contributed to their quality. Consistent with the Commissioner's remarks on the benefits of greater collaboration with the private sector,⁷ broad consultations will increase the legitimacy of the Bureau's advocacy efforts and contribute to greater predictability for businesses.

Second, parties should be encouraged to avail themselves of the confidentiality protections in section 29 of the *Competition Act* that apply to information voluntarily provided to the Bureau. The Bureau may want to consider additional ways to protect confidential information and encourage stakeholder participation on potential advocacy initiatives. For example, the Bureau may seek to coordinate with the federal or provincial regulatory body overseeing the regulatory measure at issue, to ensure that confidential information the Bureau communicates will be kept confidential. Another approach would be to assure private parties that information provided to the Bureau in the course of a potential advocacy initiative may be submitted on something akin to a "without prejudice" basis, i.e., will not be used against that party in the context of an enforcement proceeding.

⁷ Remarks by John Pecman, Interim Commissioner of Competition (April 16, 2013), available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03561.html.

Third, the Bureau should be mindful that interested parties could interpret the mere fact that the Bureau has initiated a study as an indication that the market being studied is not intensely competitive, which itself could have a significant impact on the reputation of competitive and law-abiding businesses. The Bureau should clearly distinguish between its advocacy initiatives and its enforcement proceedings, and should be aware that parties may have an interest in “spinning” the fact of a Bureau advocacy initiative for their own private interests.

Fourth, the CBA Section encourages the Bureau to rely as much as possible on verifiable factual and economic evidence (not unsubstantiated claims or hypotheses) in formulating positions it will advocate. This approach will contribute to the legitimacy of the Bureau’s advocacy efforts, and the information gathering powers and economic expertise in the Bureau in competition matters will allow the Bureau to make a useful (and possibly unique) contribution.

Fifth, in pursuing potential advocacy initiatives, the CBA Section urges the Bureau to adhere to the principles in its *Action Plan on Transparency*.⁸ The Bureau has committed to building trust by applying Canada’s competition laws in a transparent and predictable manner. In particular, it has committed to publish information about the outcome of its inquiries in a way that balances the preservation of confidential business information with the public’s right to know. As the Bureau moves forward with specific advocacy initiatives, the CBA Section encourages the Bureau to take a similar approach to outcomes or submissions that are the result of the advocacy initiatives, in the spirit of its commitments in the *Action Plan on Transparency*.

IV. CONCLUSION

The CBA Section welcomes the opportunity to comment on the Bureau’s potential advocacy initiatives and hopes this submission will be of assistance. We would be pleased to discuss these comments in more detail at the Bureau’s convenience, if that would be helpful.

⁸ Canada, Competition Bureau website, “Home – Our Organization – Transparency” (May 28, 2013), available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03568.html.