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Memorandum

To Glenn Elder
Senior Competition Law Officer

From Davies Ward Phillips & Vineberg LLP

Date January 22, 2009

Subject **Comments on the Draft Information Bulletin on Trade Associations**

1. Introduction

Davies Ward Phillips & Vineberg LLP is pleased to have the opportunity to submit comments on the Draft Information Bulletin on Trade Associations (the "**Draft Bulletin**"), released by the Competition Bureau (the "**Bureau**") for public consultation on October 24, 2008.

We strongly support the Bureau's commitment to the stakeholder consultation process as well as its public education program, including guidelines, bulletins and other interpretive aids made widely available to the business community in Canada. In this specific case, we welcome the release of the Draft Bulletin and the information and guidance it provides on the applicability of the *Competition Act* (the "**Act**") to activities conducted by or under the auspices of trade associations.

We agree with much of the information and guidance included in the Draft Bulletin. As a result, our comments in this memorandum are limited to areas of suggested improvement and clarification.

2. Discussion of the Draft Bulletin

(a) General Comments

Context

It would be helpful to emphasize that trade association activity continues to come under scrutiny in Canada (just as it does in other jurisdictions), and to provide some specific examples of such scrutiny in the main text of the Draft Bulletin (rather than just in Appendix I). Such a discussion would help trade associations and their members understand the extent to which their conduct could raise issues under the Act.

Avoid Legalisms and Generalities

It would be helpful for the Draft Bulletin to avoid legalisms and generalities that lack sufficient concrete guidance. For example, section 3.7.3 of the Draft Bulletin states that "[standard setting organizations] should *generally avoid* adopting standards that require members to gain access to intellectual property controlled by certain members of the association" (emphasis added), without explaining the Bureau's view of when it is actually permissible to adopt such standards.

We suggest that the Bureau review the Draft Bulletin to ensure that the language used is clear and understandable and that examples are provided whenever possible to give greater meaning to general statements. More specific examples or guidance would increase the usefulness of the Draft Bulletin to trade associations and their members.

Clarify That Guidelines Not Mandatory

We suggest that the Draft Bulletin make it clear that the guidelines in section 4.2 are suggestions only and should not be considered mandatory. We also suggest that this point 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. Finally, we suggest that the Draft Bulletin make it clear that particular guidelines can and should be adapted to a company's or organization's specific circumstances as required.

(b) Specific Comments

Part 2.1: Conspiracy

We suggest that the Bureau review the discussion of the elements of the conspiracy offence to ensure that it is consistent with the Supreme Court of Canada's decision in *PANS*.[1] We also suggest that consideration be given to revising the first sentence of the second paragraph to make it clear that the Crown must prove each of the elements beyond a reasonable doubt in order to obtain a conviction under the conspiracy provisions. Finally, given that the defence offered by subsection 45(3) of the Act is of increasing importance for industries and their associations, it would be helpful for the Bureau to go beyond the very generic discussion in the Draft Bulletin and provide one or more examples of when an agreement that falls under subsection 45(3) could still be considered illegal by virtue of the operation of subsection 45(4). The Draft Bulletin could, for example, refer to advisory opinions considering this issue, such as the advisory opinion issued to the Society of Obstetricians and Gynaecologists of Canada.[2]

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1 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.

2 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.

Parts 2.2 and 2.3: Bid-Rigging and Price Maintenance

It would be helpful for the Bureau to provide examples of how the bid-rigging and price maintenance provisions could apply in the context of trade associations. Such examples would help trade associations and their members understand the extent to which their conduct could raise issues under these provisions of the Act.

Part 3.1: Information Sharing

The Draft Bulletin acknowledges that "[a]n important task of associations is to provide their members with information relevant to their industry". Given the importance of this task, it would be helpful to provide more specific advice or examples of when an agreement among trade association members to exchange information might in itself violate the conspiracy provisions of the Act.

In addition, the Draft Bulletin's recommendations with respect to the dissemination of individual firm data and the use of independent data collection agencies are too rigid. For example, there should not be any concern about the dissemination of individual firm data that does not relate to a competitively sensitive issue. Similarly, the need to use an independent data collection agency will depend on a range of circumstances, such as the type of information involved and whether the trade association members could conceivably be viewed as possessing market power.

Finally, while it is helpful that the Draft Bulletin lists the steps that a trade association should consider following to reduce the competition law risks associated with the collection and dissemination of information that may be commercially sensitive, the value of this list is undermined by the use of the phrases "reduces the likelihood" and "less likely". This type of qualified language is not as helpful (and does not provide as much guidance to the target audience) as stating that the collection and dissemination of information "will not" or "is unlikely to" raise issues under the Act where the suggested steps are followed.

Part 3.2: Agendas and Meetings

It is unrealistic and often unnecessary to recommend that "the association have legal counsel review agendas and minutes and attend all association meetings where there is potential for discussion of sensitive subjects". First, many associations have memberships that include a wide range of firms that are not necessarily competitors. It would seem unnecessary to require legal counsel to review all agendas and minutes in those circumstances. Second, where a trade 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. That being said, we agree that it may be advisable for legal counsel to attend association meetings where the agenda includes topics which are likely to raise significant issues under the Act.

Part 3.4: Association Discipline

In order to increase the usefulness of the Draft Bulletin to its target audience, the Bureau may want to consider discussing a broader range of situations (other than just fee guidelines and recommendations) where coercion and/or sanctions could give rise to competition law concerns.

Part 3.5: Fee Guidelines

While it is helpful that the Draft Bulletin lists the criteria which the Bureau believes must be satisfied by fee guidelines in order not to raise issues under the Act, the value of this list is undermined by the use of the words "less likely". As noted above, this type of qualified language is not as helpful (and does not provide as much guidance to the target audience) as stating that fee guidelines "will not" or "are unlikely to" raise issues under the Act where the criteria are met.

Part 3.7.1: Self-Regulation

The Draft Bulletin should accurately set out the degree of impact on competition required to create liability under the Act (e.g., an undue lessening or prevention of competition in respect of the conspiracy provisions or a substantial lessening or prevention of competition in respect of the abuse of dominance provisions). The first paragraph in section 3.7.1 of the Draft Bulletin, however, states that there is a risk that association rules and regulations "can have a negative impact on competition". This language risks leaving the erroneous impression that any negative impact on competition can be an issue and should therefore be corrected. (Similar language is used elsewhere in section 3.7.1. and should also be corrected.)

Part 3.7.2: Voluntary Codes (Codes of Conduct)

This section provides that "[v]oluntary 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". It would be helpful for the Bureau to explain why "explicit commitment of the leadership", "acceptance by members" and "regular flow of information" are characteristics of voluntary codes which do not create competition law concerns.

Part 3.7.3: Standard Setting Organizations

This section provides that "[a]ssociations should generally avoid adopting standards that require members to gain access to intellectual property controlled by certain members of the association". This may not be practical for many standard setting organizations. In addition, there should not be competition law concerns if intellectual property included in the standard has been fully disclosed in the standard setting process. Such disclosure ensures that the association is aware of the implications of adopting the standard and could,

for example, negotiate a form of license agreement and a royalty rate in relation to any intellectual property in the standard before adopting it.

Part 4.2: Guidelines

(i) *General*

The Bureau should consider qualifying certain of the suggested guidelines under this heading with words such as "where applicable" or "if possible". For example, the suggestion that a compliance officer be appointed is likely impractical for many associations. Similarly, it is not necessarily the case that an association is able to control who is elected to its board.

(ii) *Agendas & Meetings*

The suggestion to "[a]llow 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 certain members are permitted to attend.

We suggest that consideration also be given to including some guidance on what should or could be done if a trade association meeting strays into inappropriate areas (perhaps inadvertently) – e.g., prominent clarification, caution, and disavowal of agreement.

(iii) *Sanctions/Discipline*

Any disciplinary action has some restrictive effect. As a result, the suggestion that sanctions should not be imposed if they would have an "anti-competitive effect" needs to be qualified by reference to a substantial or significant anti-competitive effect.

(iv) *Voluntary Codes*

As noted above, it would be helpful for the Bureau to explain why "explicit commitment of the leadership" is a characteristic of voluntary codes which do not create competition law concerns.

(v) *Legal Counsel's Role*

For the reasons noted above, it is unrealistic and often unnecessary for legal counsel to approve the agenda or minutes of all association meetings and actively participate in all association meetings. Moreover, the recommendation that legal counsel actively participate in all association meetings seems to contradict the recommendation in section 3.2 that counsel attend meetings "where there is potential for discussion of sensitive subjects", although, as noted above, even this statement is too broad.

(vi) *Immunity Program*

The Bureau should consider placing this discussion under a separate heading so that it stands out and is not lost. In addition, it would be helpful for the Bureau to provide greater

detail on how its Immunity Program would apply in the context of an application for immunity by a trade association. For example, would the immunity extend to an association's members? Without this additional discussion, the Draft Bulletin could be misleading and an association could be surprised by the consequences of an immunity application for its members.

Appendix I

We suggest that the Bureau carefully review each of the three cases summarized in Appendix I to ensure that the descriptions of the activities and the orders are fair and accurate. For example, we note that the Kent County Law Association and real estate orders were issued under section 34(2) of the 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, for example, to "Time Frame of Conduct" and "Trade Association Activity".

In addition, with respect to the commentary included in Appendix I, we note that the Kent County Law Association is criticized for not taking steps to avoid uniform conduct on the part of its membership even though the Association did send a letter to members informing them that the recent fee schedule was only suggested. What is the Bureau suggesting the Association should have done in addition to sending the letter?

Finally, we suggest that the Bureau consider incorporating specific case references within the main text of the Draft Bulletin and expanding the cases referred to beyond those included in Appendix I. For example, the Bureau might consider discussing (or at least citing where relevant) the various reported cases in which convictions were registered against trade associations or in which trade association personnel were charged (e.g. Electrical Contractors, B.C. Pharmacists, Armco and Container Materials). We suggest that the Bureau also 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.[3]

3. Conclusion

Davies Ward Phillips & Vineberg is grateful for the opportunity to submit these comments and hopes that they are of assistance. We would be pleased to meet with you to discuss our comments in greater detail if that would be helpful.

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[3] See *Real Estate Industry – Suggested Fee Schedule* (August 30, 2006), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02204.html.