

SUMMARY OF ICN TELESEMINAR ON BUILDING AGENCY/BAR RELATIONSHIPS

On September 29, 2009 the ICN Advocacy Working Group held a teleseminar on the Canadian experience in building relationships between the competition authority and the private bar. The panellists were Sheridan Scott, a partner at Bennett Jones LLP and former Canadian Commissioner of Competition; Adam Fanaki, Acting Senior Deputy Commissioner of Competition, Mergers Branch with the Competition Bureau; and John Bodrug, a partner at Davies Ward Phillips & Vineberg LLP and past Chair of the National Competition Law Section of the Canadian Bar Association (the "CBA"). The speakers discussed general principles that help to facilitate a more collaborative relationship and provided specific examples from the Canadian experience that demonstrate how this has been realized.

Ms. Scott noted that at the time of her appointment as Commissioner of Competition, the relationship between the Competition Bureau and the private bar was characterized by both sides as being quite negative. In response, she oversaw the establishment of a task force and appointed an internal champion within the Bureau to take responsibility for the initiative. This champion, and many of the members of the task force, had both public and private sector experience, which provided valuable insight in investigating the problem and crafting solutions to facilitate cooperation with the private bar. Among the first key issues addressed by the task force was the meaning of "collaboration"—that is, what level of participation by the private bar in policy-making and enforcement is appropriate, and what forms should that participation take? The recommendations that emerged were for more frequent interaction with members of the bar, through not only formal task forces and working groups, but also informal consultations relating to policy issues. An important feature of these consultations is that comments and ideas are not for attribution, which allows for more open dialogue where contrary views can be expressed without fear of retribution in future matters. The task force issued a report which is available at: http://www.cba.org/CBA/sections_Competition/pdf/endorsed_task.pdf.

There have been numerous benefits to this more collaborative process. For the members of the bar, engaging in consultation with the Competition Bureau provides a greater understanding of the priorities and perspectives of the agency, which assists in advising clients on potential courses of conduct. Agency participation in activities such as continuing legal education programs also provides value to members of the bar, particularly where agency

representatives are prepared to comment on specific policies and case resolutions. While the members of the bar and the Bureau do not always agree on the issues, there is definite value to knowing what the agency's positions are rather than being surprised in the context of a particular case. Annual CBA Merger Committee roundtables were identified as a specific initiative that helps to facilitate an understanding of a range of procedural and substantive issues.

For the agency's part, collaboration with the private bar is only one means of outreach to the public. One of the initiatives championed by Ms. Scott was the introduction of sector days, which saw representatives of the Competition Bureau meet with industry leaders in key sectors of the Canadian economy to discuss competition law and policy outside of the traditional investigative process.

Through the various collaborative efforts, certain challenges and strategies have been identified that provide valuable lessons for regulatory bodies and members of the private bar in other jurisdictions. On the challenges side, panellists noted a tendency on the part of the agency to generalize the opinions of members of the bar as though they spoke with a single, unified voice. However members of the bar often represent a broad range of clients and often take different positions on a particular issue. A key to successful collaboration is that members of the bar separate client and policy interests—that is, when participating in a consultation, they need to be mindful of what is best for the economy and competition policy generally, and not simply advocate a particular position based on a particular client interest. Many members of the bar have a genuine interest in competition law and policy beyond particular client relationships.

One benefit of consultation during the planning stage is that potential policy shortcomings or obvious points of disagreement can be identified and addressed early in the process, before positions have solidified and become more difficult to change. Involving members of the bar early in the process also sends a message about the significance and potential impact of the consultation. Where comments are solicited on draft guidelines, it encourages meaningful collaboration if members of the bar sense that their input is genuinely considered, even if their views are not adopted in the agency's final policy. Where consultation is merely pro forma, or where the opinions and advice of the bar are not accepted, the agency should avoid suggesting that the bar has in any way endorsed or collaborated on the final product. Co-opting the voice and standing of the bar in this manner would likely impair future efforts at collaboration. In the context of a particular collaboration, the agency should also be clear on

what statements are intended to be passed on by bar members to clients as either a current position or one that is under consideration – in some cases, the agency may welcome the bar's assistance in conveying enforcement positions; in others, the communications may not reflect an agency position, but merely the exploration of policy options.

It is also important that the agency seek input representing a diverse range of viewpoints. Not all lawyers practice at large firms or act for large corporations. Reaching out to practitioners outside of the traditional competition bar is a helpful component of any policy aimed at enhancing consultation and ensuring optimal policy results. The Canadian Bureau recognizes this and has made efforts to include plaintiffs' counsel and other non-traditional demographics in its consultations. Open invitation forums and informal roundtables can be especially effective in this regard. The CBA has a regular rotation of members serving in executive positions, which also facilitates this objective.

An example highlighted by Mr. Fanaki that demonstrates the benefits of collaboration is the approach to dealing with a wide range of issues raised by recent amendments to Canada's *Competition Act* that overhauled the merger review process. The Competition Bureau organized a conference call which was attended by a majority of the members of the competition bar. The agency presented a proposal for dealing with various transitional issues, which was subsequently modified to address concerns raised by members of the bar during the call. There was tremendous interest from the members of the bar, both from an academic and a practical standpoint, in addressing uncertainty surrounding the new law and how it would be enforced. Through the consultation process, the parties were able to reach an understanding on a process to be followed during the transitional period, which provided the certainty that is essential in merger reviews. The recent amendments have also provided opportunities for outreach on the part of the Bureau. The Bureau partnered with law firms to hold seminars for corporate clients, taking advantage of the consistent contact and pipeline to business executives that law firms enjoy, but the Bureau generally does not.

The efficient manner in which both the agency and the bar have been able to adapt to the changes in the law is an excellent demonstration of the application of the principles discussed by all three panellists during the teleseminar. While still a work in progress, the relationship between the Bureau and the private bar in Canada has become much more collaborative, to the benefit of all involved.