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BY E-MAIL & COURIER

August 17, 2009

Mr. David Faye, Competition Law Officer
 Competition Bureau
 50 Victoria St.
 Gatineau, Quebec
 K1A 0C9

Dear Mr. Faye:

RE: Draft Competitor Collaboration Guidelines

We write in response to the call for comment on the draft Competitor Collaboration Guidelines (the "Guidelines") issued by the Competition Bureau (the "Bureau") on May 8, 2009, in order to comment, in particular, on the discussion in that draft of the Export Agreements Defence set forth in parts 2.6 (a) and 3.5(b).

Sections 45(5) and 90.1(8) of the Competition Act (the "Act"), provide in essentially identical language a defence (the "Export Defence") in respect of any agreement or arrangement that "*relates only to the export of products from Canada*", unless certain circumstances are present to bring an arrangement or agreement within the Act's coverage. However, instead of mirroring the precise statutory language of the Act with respect to whether an "*export*" "*from Canada*" is involved, the draft Guidelines state that for the Export Defence to apply "*the agreement must relate only to the supply of products outside of Canada*".

We are sure that the clear intent of the draft Guidelines, which talk in terms of agreements "relating" to the supply of goods outside Canada and which go on to cite as an example of a situation which is not protected by the Export Defence, that is, the supply of products in Canada, is to mirror the scope of protection afforded by the statutory language found in the Act. However, because exports quite often involve a number of intermediate steps in the course of export and, by their nature, often involve steps taken in Canada in order to supply goods for ultimate shipment and delivery to customers outside of Canada (e.g., a contract with an overseas customer or Canadian intermediary, possibly executed in Canada, to export from Canada, bailment agreements with warehouses at ports, delivery to an ocean going vessel or sale FOB vessel or carrier at Canadian port or location for overseas delivery, etc.),

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we believe it would be clearer if the language in the Guidelines were modified to read as follows:

“For the export defence to apply, the agreement must relate only to the supply of products destined for markets or recipients outside of Canada and not, for example, the supply of products to Canadian markets.”

This is consistent with the definition of "supply" which is contained in Section 2(1) of the Act: "...in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto". Thus, under the Act, a mere offer to sell constitutes supply. A narrow reading of the words in the draft Guidelines might lead one to believe that an exporter would have to travel outside of Canada in order to issue offers to sell product into foreign markets in order to enjoy the benefit of the Export Defence set out in the Act. Parliament cannot have intended the Export Exemptions to be applied in this way.

Second, we believe it would be useful to indicate, in the course of the discussion of the Export Defence that various arrangements which are clearly related to an export sale of goods from Canada covered by the Export Defence (e.g., transportation to a port, temporary storage at a port, stevedoring and loading of goods onboard vessels, ocean transport), are also themselves covered by that defence because they relate to exports. This is certainly consistent with the definitions of "export" contained in Black's Law Dictionary which defines the verb "export" as "to send, take or carry (a good or commodity) out of the country," and the noun "export" as "the process of transporting products or services to another country." Export contemplates the entirety of this process, whereas in our submission, "supply" contemplates only a very limited part thereof and is therefore an inappropriate foundation for a test for export.

Again, we are sure that these ancillary activities within Canada are certainly implicit in the discussion found in the Guidelines, but we feel the draft would benefit by making the point explicit, consistent with the clear language and intent of the Act.

Finally, we note that the first sentence in the second paragraph of part 1.3 of the draft Guidelines refers only to the ancillary restraints defence under section 45(4) of the Act. We suggest that the sentence be amended to also refer to consideration of the applicability of the section 45(5) Export Defence, as well as the defences enumerated in section 45(6) of the Act prior to a decision to refer the matter to the DPP.

We would be pleased to discuss these submissions further, should you find that helpful.

Best regards,

BAKER & MCKENZIE LLP


Janice McAuley
/sb

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