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Practical Issues in Responding to Bureau Investigations and Ensuring Competition Law Compliance

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PRACTICAL ISSUES IN RESPONDING TO BUREAU INVESTIGATIONS AND ENSURING COMPETITION LAW COMPLIANCE

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1. Introduction

As described more fully below, the Commissioner of Competition (the "Commissioner")[3], Canada's chief competition law enforcement official, has a wide array of tools available to him to assist in investigating matters and gathering evidence under the *Competition Act* (the "Act").[4] However, even absent the resort to formal investigative tools such as search and seizure and orders under section 11 of the Act, targets of an investigation often voluntarily co-operate with the Commissioner and Competition Bureau ("Bureau") staff.

Compliance with competition laws and Bureau information demands is a laudable goal. But, ensuring compliance and responding fully to Bureau investigations is not always easy or straightforward. This paper overviews the formal and informal means by which the Commissioner gathers information and offers suggestions on addressing issues that often arise in responding to a Bureau investigation.[5]

2. The Commissioner

The Commissioner has exclusive authority to administer and enforce the Act and is responsible for investigating suspected violations of the Act. The Commissioner must commence a formal inquiry whenever he has reason to believe a criminal offence has been, or is about to be,

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[3] The Commissioner's former title was Director of Investigation and Research.

[4] R.S.C. 1985, c. C-34, as amended.

[5] The paper does not discuss the important and related topics of the elements of an "effective" compliance program, the Commissioner's immunity and favourable treatment policies and whistleblowing. Each of those topics is discussed in other papers being presented at this conference.

committed or that grounds exist for the Tribunal to make an order regarding a reviewable practice.[6] While most inquiries begin at the Commissioner's instance, an inquiry also must be commenced when the federal Minister of Industry so directs,[7] or on the sworn application of six Canadian residents.[8]

Once an inquiry is underway, the Commissioner may make formal or informal requests for information/assistance of targets of the investigation and other marketplace participants. Formal investigative tools available to the Commissioner include search and seizure, examinations under oath, and production of records or other physical evidence.[9] Computer data bases and corporate records of both Canadian and foreign affiliates are vulnerable to compulsory process. Less formal enquiries also may be made. Whether an investigation is conducted on a formal or informal basis depends on a number of factors, the most important of which are the nature of the matter under investigation and the level of co-operation the Bureau perceives the parties are providing.

3. Informal Inquiries

Informal inquiries may take a variety of forms, ranging from telephone calls from Bureau case officers to written requests for documents or other information ("RFIs"). An RFI typically is a series of specific questions crafted by Bureau staff with a view to gathering evidence relevant to their investigation. Over-broad RFIs, RFIs that request information which is clearly irrelevant, and/or RFIs which require a response within an unreasonably short time frame should be negotiated with Bureau staff so that the informant is able to focus on obtaining the best relevant documents and information. Increasingly, the Bureau requests that responses to RFIs be accompanied by a sworn affidavit of full compliance. For this reason, it is important that the RFI is fully understood and that compliance can be determined.

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6 *Competition Act* at s. 10(1)(b).

7 *Ibid*. at s. 10(1)(c).

8 *Ibid*. at s. 10(1)(a).

9 See also Madeleine Renaud, "Dealing with a criminal investigation under the *Competition Act*: Responding to Orders and Information Requests" (Annual Competition Law Conference, 1996).

Informal inquiries may be directed at the targets of the investigation and their suppliers, customers and competitors. For example, when the Bureau recently examined unusual increases in the retail price of gasoline, investigators contacted representatives of the petroleum industry and other informed sources for information regarding the sudden uniform price increase.[10]

Tips for Counsel #1: Responding to an RFI
• Review the RFI to identify the information sought and requested response date. • Consider contacting Bureau staff to clarify ambiguous questions or negotiate unreasonable requests. • Appoint a document coordinator and implement a document retrieval plan that includes searching for responsive documents stored electronically. • With assistance of experts (if required) prepare answers to questions which seek narrative responses. • Vet responses for privileged documents. • Review all documents and consider relevance/importance to responding to Bureau's investigations/allegations.

Requiring informants to attest to full compliance with an RFI adds a degree of formality to the RFI process. However, it is important to remember that RFIs and other informal inquiries are not mandated by the Act and responses are not mandatory. That said, it should be expected that failure to respond to an RFI in a full and timely manner may lead to the Commissioner's use of his formal powers under the Act to compel production. Those powers are discussed below.

4. Search and Seizure

(a) Commissioner's Right to Search

The Commissioner's powers of search and seizure are set out in sections 15 and 16 of the Act.

Section 15 allows the Commissioner to make an *ex parte* application to a court to obtain a search warrant. The application must demonstrate that there are reasonable grounds to believe that: (i) a criminal offence has been committed, is about to be committed, or grounds exist for the

[10] Competition Bureau, "Competition Commissioner Launches Immediate Examination of Retail Gasoline Prices Under the *Competition Act"* (22 July 1999).

Competition Tribunal to make an order respecting a reviewable matter; and (ii) there are records or other things that will afford evidence of the offence or matter at the premises to be searched.

The Commissioner must be in possession of a warrant to search premises, unless exigent circumstances exist, in which case a warrantless search may be conducted provided there are reasonable grounds to believe that an offence has been (or is about to be) committed, or that grounds exist for the Competition Tribunal to make an order.[11] Exigent circumstances might exist if the delay caused by obtaining a warrant would result in the destruction or loss of evidence.[12]

If access is denied, or the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant may authorize police to assist in the search. It is an offence under the Act for any person in possession or control of premises or computer systems subject to a warrant to fail to make the premises named in a warrant available for search without good and sufficient cause.[13] This offence is punishable by a maximum fine of $5,000, imprisonment for a maximum of two years, or both. In addition, destroying or altering records that are subject to a warrant under section 15 is an offence punishable by a fine of up to $50,000, imprisonment for a maximum of five years, or both.[14]

(b) Contents of the Search Warrant

The search warrant should name the specific individuals authorized to conduct the search, specify the premises to be searched and contain a description of the types of records sought. If counsel is present at the time of the search, he or she ought to be careful to observe that only those persons named in the warrant are present and that the records taken comply with the description of what is sought in the warrant. The warrant also may describe the area of the premises that are to be searched.

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11 *Competition Act* at s. 15(7).

12 *Ibid*. at s. 15(8).

13 *Ibid.* at s. 65(1).

14 *Ibid*. at s. 65(3).

(c) Computer Searches

The Act provides broad powers to persons authorized to search premises in that they may use or cause to be used any computer system on the premises to search any data *contained in or available to the computer system*, wherever located, print the record and seize it.[15] The term "computer systems" includes portable computers, pocket and hand-held electronic diaries and personal digital assistants containing calendars, telephone lists and other information.[16] If a log-in name or password is required to access the computer system, the Commissioner's position is that an individual on the premises is required to assist the persons conducting the search to gain access to the computer. There is no case law to support this position. However, the issue may be moot in most instances because technology currently available to search officials can give them access to all data available to a computer regardless of whether passwords are obtained.

It is not uncommon for multinational companies to make data stored in one country available to employees in another. The Commissioner's position is that if the information is "contained in or available to" a computer in Canada, then it can be seized, even if the information is stored at locations outside of Canada.[17] Again, there is no case law to support this position. It has been suggested by some commentators that transnational computer searches may constitute an infringement of State sovereignty of the searched country.[18]

(d) Protection of Privileged Documents

The Commissioner is prohibited by the Act from examining, copying or seizing documents without providing a reasonable opportunity for claims of solicitor-client privilege to

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15 *Competition Act* at s. 16(1) (emphasis added).

16 Harry Chandler, "Criminal Investigations: Process and Procedure" (Canadian Bar Association Competition Law Annual Conference, 24 September 1998). The Act's definition term of the term "computer system" refers to the definition found in ss. 342.1(2) of the *Criminal Code*.

17 James D. Sutton , "Investigations under the Competition Act: Recent Issues" (Important Changes in Competition Law and Competitive Business Practices, The Canadian Institute, 10 May 1996).

18 *Ibid*. at 66. See also Calvin S. Goldman, Q.C. and Joel T. Kissack, "US/Canada Antitrust Co-operation and Cross-border Computer Searches" (presented at American Bar Association 1998 Annual Meeting , Toronto, Canada, 3 August 1998).

be made.[19] Any person in authority at the premises may claim the privilege and the Commissioner cannot examine or copy any documents over which privilege has been claimed. Upon making the claim, the document should be placed in a sealed package and put in the custody of a judicial officer until a judge can review it.

The party alleging the privilege must then make an application to the court within thirty days for a determination as to whether the document is in fact the subject of a proper claim of privilege. If such an application is not brought within thirty days, the Commissioner may bring an *ex parte* application for an order that the documents be delivered to him.

The formal privilege claim procedures under the Act can be avoided if privileged claims are resolved between counsel and the head of the search team. For this and other practical reasons (*e.g.*, getting copies of all seized documents before they are removed from the premises), it is desirable to establish good relationships with the search team from the outset of their investigation.

(e) Use of Search and Seizure Powers in Civil Cases

While the Commissioner's powers of search and seizure are most applicable in the case of criminal investigations, the Bureau has used these powers to gather evidence in non-criminal inquiries.[20] Search and seizure powers were first used in a non-criminal investigation of an alleged abuse of a dominant position when, without any prior requests for information, and no warning to the targeted corporations, the Bureau exercised search warrants simultaneously in seven different locations across Canada.[21] The Commissioner's willingness to exercise and obtain a search warrant in non-criminal circumstances create a need for counsel to be aware of the Act's search and seizure provisions and to develop a search response plan.

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19 *Competition Act* at s. 19(2).

20 John F. Clifford and J. William Rowley, "Search and Seizure: Canada Gets Tough" Spring 1996 *Antitrust* 10.

21 *Ibid*.

Responding to a Search Warrant – Do's and Don'ts[22]	
Do's	**Don'ts**
• Ask to see a copy of the warrant and read it to determine: ▪ what offence has been alleged? ▪ what premises are covered? ▪ what documents are sought? • Ask each member of the search team to identify themselves • Contact legal counsel and any individuals named in the warrant whose offices are to be searched. • Identify documents that may be subject to solicitor-client privilege and keep them separate	• Do not agree to expand the scope of the search to areas not covered in the warrant • Do not answer substantive questions. • Do not impede or hinder the search team in any way.

5. Section 11 Orders

(a) Introduction

An order made under section 11 of the Act (so-called "section 11 order") is another of the information gathering tools available to the Commissioner once a formal inquiry has been commenced under the Act. In recent years, section 11 orders have been used with increased frequency.

Section 11 orders are available in respect of investigations into criminal or non-criminal reviewable matters to compel testimony, require the production of documents or require the production of a written return. A section 11 order can be obtained by the Commissioner on an *ex parte* basis if a judge is satisfied that an inquiry is being made under section 10 of the Act and that a person has, or is likely to have, information that is relevant to the inquiry, in which case the judge may order that person to: (i) be examined under oath; (ii) produce records or other things; and/or (iii) deliver a written statement under oath.

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[22] This list is a compilation of suggestions from John F. Clifford and J. William Rowley, *Ibid*., and W. Thomas

The subject of a section 11 order cannot refuse to comply with it on the basis that their evidence may incriminate themselves, or subject them to further examination. However, evidence given by an individual pursuant to a section 11 order cannot be used or received against that individual in any criminal proceedings thereafter instituted against her (other than a prosecution for perjury under section 132 or for giving contradictory evidence in a subsequent judicial proceeding under section 136 of the *Criminal Code*).[23]

Failure to comply with a section 11 order without good and sufficient cause can result in a fine of up to $5,000 and/or imprisonment for up to two years.[24]

(b) Examination Under Oath

Persons under examination pursuant to a section 11 order have the right to have their counsel present,[25] although the role of counsel is limited to objecting to improper questioning and clarifying its client's statements.[26] Others whose conduct is under inquiry also are entitled to attend with counsel.[27] However, attendance may be prohibited if the Bureau representative satisfies the examiner that the person's presence would be prejudicial to the effective conduct of the examination or result in the disclosure of confidential information.[28]

The ability of the Commissioner to compel a (natural) person to be examined under oath initially raised concerns about self-incrimination under section 7 of the *Canadian Charter of Rights and Freedoms,* which guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of

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McGrough Jr., "Search and Seizure in the U.S. - Surviving a Search Warrant" Spring 1996 Antitrust (ABA) Vol. 10, No.2.

23 *Competition Act* at s. 11(3). Note that the compelled testimony rules apply to persons, but the exclusion of evidence in future proceedings only applies with respect to individuals.

24 *Ibid*. at s. 65(2).

25 *Ibid.* at s. 12(3).

26 *Irvine v. Restrictive Trade Practices Commission*, [1987] 1 S.C.R. 181, at 231-135.

27 *Competition Act* at s. 12(4).

28 *Ibid*.

fundamental justice."[29] However, the Supreme Court of Canada considered the issue under similar legislation in the Branch[30] case and determined that section 7 rights were not offended.[31]

(c) Production of Records

A section 11 order may compel persons named in the order to produce documents in their possession, or, in the case of corporations, the possession of any affiliates of the person whether located in Canada or abroad. Documents that are produced in response to a section 11 order (unlike oral testimony or written returns by an individual) are not subject to any immunity and may be used against the informant in current or future investigations.

Anyone who destroys or alters documents covered by a section 11 order is guilty of an offence and is liable on conviction to a maximum fine of $50,000 and/or a maximum imprisonment of five years.[32] If an officer or director participates in, authorizes or acquiesces to the destruction or alteration, that individual will be held personally liable.[33] It is therefore important that counsel advise clients under investigation that they ought to ensure that all documents remain in the state in which they exist at the time the order is issued.

(d) Responding to a Section 11 Order

The scope of section 11 orders can be extensive, although no more extensive than RFIs issued in complex cases. The Bureau's current practice is to obtain section 11 orders (rather than RFIs) in most cases of significance. From the Bureau's perspective, a section 11 order is preferable because compliance is required by court order, a fact which may result in quicker and more complete responses.

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29 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, section 7.

30 *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

31 For further discussion of this case, see John F. Clifford and Omar K. Wakil, "*When the Bureau calls: Responding to Antitrust Investigations*" (1999 Canadian Bar Association Annual Conference on Competition Law).

32 *Competition Act*. at s. 65(3).

33 *Ibid*. at s. 65(4).

Compliance with a section 11 order (and RFIs) will require the appointment of one or more document co-ordinators who will have to ensure that all responsive documents are reviewed for possible privilege claims. The process will be disruptive to a target's businesses and will require the attention of senior executives. It was reported last year that section 11 orders issued in connection with investigation of the bank mergers resulted in more than 400,000 pages of paper as well as entire databases (together with their operating codes and software) being provided to the Bureau. [34]

Tips for Counsel #2: Responding to Section 11 Orders
• Review order to determine scope and required response date. • Contact Bureau to clarify ambiguous terms. • Identify/interview/prepare witnesses to be examined. Consider whether independent counsel for individuals should be retained. • Appoint document coordinator and implement document retrieval program that includes searching for responsive documents stored electronically. • Vet responses for privileged documents. • Review all documents and consider relevance/importance to witness interviews and to responding to Bureau's investigations/allegations.

To reduce the compliance burden, counsel should first read the order carefully, speak to the Bureau to clarify any ambiguous provisions and attempt to reduce the scope of the order if full compliance could result in an enormous volume of documents. Bureau time frames for responding to section 11 orders can also be extremely short but the Bureau is willing to listen and sometimes permit extensions.

6. Wiretaps

Wiretapping is a relatively new addition to the Commissioner's arsenal of investigative tools. Section 183 of the *Criminal Code* recently was amended to add three offences under the Act to the list of offences for which judicial authorization to intercept private communications

[34] Rod McQueen, "Showing Banks Who's Boss: Competition authorities are even using subpoenas to extract mountains of data on proposed bank mergers" *The Financial Post Weekly* (22 August 1998) 7.

may be obtained.[35] The three *Competition Act* offences are price-fixing, bid-rigging and deceptive telemarketing.

To obtain an order permitting a wiretap, the Commissioner must submit a sworn affidavit setting out:

- the facts upon which the application is based;
- the type of communication to be intercepted;
- the names, addresses and occupations, if known, of the persons whose communications are to be intercepted;
- the nature and location of the place, if known, at which communications are to be intercepted;
- the manner of interception to be used;
- the length of time for which the wiretap is requested; and
- whether other investigative procedures have been tried and failed or why it appears they are unlikely to succeed.[36]

As a precondition to authorizing a wiretap, a judge must be satisfied that it is in the best interests of the administration of justice and that other investigative procedures have been tried, have failed or are unlikely to succeed.[37]

The wiretap provisions are untested. The Bureau insists that wiretaps will only be used in exceptional circumstances, and that the likelihood of inappropriate material (e.g. privileged information) being collected will be outlined in its application.[38] The Bureau also will include in

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35 Bill C-20, 1999 c.2, assented to March 11, 1999, section 47.

36 *Criminal Code*, R.S.C. 1985, c.C-46, s. 185(1).

37 *Ibid*. at s. 186(1).

38 Competition Bureau, "Interception of Private Communications" 22 February 1999.

its application a requirement for ongoing monitoring under which interception must be discontinued as soon as it becomes clear that privileged communications are being overheard.

7. Conducting an Internal Investigation

(a) Introduction

A variety of situations may result in a need to conduct an internal antitrust investigation of a client's operations. Such situations include:

- upon learning of an investigation by the Bureau or foreign antitrust authority of the client's activities;

- when the client is changing its distribution practices (especially when terminating distributors);

- upon learning of actual or rumoured antitrust-related complaints about the client by competitors, customers or suppliers; or

- during periodic antitrust audits which should occur as part of an ongoing compliance program.

The conduct of an investigation might include a review of privilege information or result in a discovery of facts that could be sufficient for the Commissioner to commence an inquiry. For strategic and other planning reasons, it will be important to ensure these findings are kept confidential and privileged. To ensure that a claim solicitor-client privilege can be made, internal antitrust investigations should be conducted by in-house counsel, outside counsel or both. Outside counsel may be better able to bring in large teams when it is preferred to conduct an investigation quickly. In circumstances where an audit results in the discovery of information that implicates particular employees, use of outside counsel also might enable in-house counsel to create some distance between the investigation and the employee, and preserve relationships that might have developed from previous interactions.

The core of any internal antitrust investigation will be a review of documents. Having in place an existing document retention program will be useful in reducing the number of documents that might be available for review. The types of records to be reviewed will vary depending on the nature of investigation, however internal investigations typically focus on the following categories of documents:

- Documents or files concerning competitors, suppliers or customers (including files where complaints from such persons are discussed);

- Documents of senior executives with decision-making power in the sales or marketing areas (especially documents relating to pricing practices);

- Reports of sales people in the field, especially reports about business won or lost to competitors; and

- Board and board-committee minutes.

Investigators should not forget to review documents stored electronically, especially e-mails (e-mails have become a very important source of documentary evidence in antitrust cases). Electronic documents stored in archives also should be retrieved and reviewed.

A documentary review should be conducted in conjunction with interviews of the employees that possess relevant documents, both to determine the likely whereabouts of relevant documents and to gain an in-depth insight into business activities that have antitrust sensitivity. Discussions with employees also might be necessary to clarify the contents of ambiguous documents.

(b) Dealing with "Hot" Documents

On occasion, documents discovered during an internal investigation will disclose that a violation of the Act might have occurred. In such cases, the Act does not require a company to incriminate itself and provide the document to the Bureau. However, the Commissioner's

Corporate Compliance Programs Bulletin[39] does recommend the use of a disciplinary code or policy relating to individuals who initiate or participate in anti-competitive conduct and recommends that disciplinary measures such as suspension, fines or dismissal be consistently applied.

An ethical issue can arise when counsel discovers documents which suggest that an intention to commit an offence in the future exists. Rule 4.11 of the Law Society of Upper Canada's *Rules of Professional Conduct*[40] states that while a lawyer is under a duty to hold in confidence all information relating to the business and affairs of the client acquired in the course of the professional relationship, "disclosure of information to prevent a crime will be justified if the lawyer has reasonable grounds for believing a crime is likely to be committed."

In certain situations, counsel may wish to consider disclosing the "hot" documents to the Bureau on a voluntary basis in order to take advantage of the Bureau's program of immunity, whereby persons coming forward at an early stage with evidence of an offence under the Act may receive more lenient treatment.[41]

8. Joint Defence Agreements

In cases where several parties are subject to investigation by the Commissioner or a foreign antitrust authority, counsel may wish to consider a joint defence agreement. These agreements, which are only applicable among parties with a common interest in the outcome of the investigation, express the parties' intention to rely on the common interest or "joint defence" privilege. The goal is to ensure a free-flow of privileged information between the parties, without constituting a waiver of the privilege that protects that information.

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39 (Ottawa: Industry Canada, 1997)

40 As amended to June 26, 1998.

41 See Commissioner of Competition, *Co-operating Parties Program* (Draft: May 7, 1999). This important program and other related topics/issues are discussed in other papers being presented at this conference.

(a) What is Common Interest Privilege?

Common interest privilege traditionally arose in the criminal law domain but is now, arguably, broad enough to protect the flow of information among parties sharing a common interest in the outcome of any sort of actual or anticipated litigation. Sopinka has stated that:

> [i]t may be necessary for certain outsiders such as a co-accused and their counsel to be present to assist in the preparation of a client's defence.[42] Indeed, an exchange of confidential information between individuals who have a common interest in anticipated litigation is within the context of this privilege.[43]

Common interest privilege will apply when the communication for which the privilege is asserted is privileged in the first place and there is actually a common interest between or amongst the parties seeking the privilege. Once there is a common interest privilege, the privilege becomes that of all the parties to whom the privileged information is disclosed.[44]

(b) For the Privilege to Apply the Communications Must be Otherwise Privileged

By its very nature, the common interest privilege requires the communications to have been privileged in the first place, otherwise, there would be no concern about waiving an existing privilege by disclosure. Where the communications consist of both privileged and non-privileged communications, the common interest privilege will only extend to the privileged communications. In *International Minerals and Chemical Corp. (Canada) v. Commonwealth* ("*International Minerals"*),[45] the court required that certain communications be disclosed even though they contained some privileged information. These communications were to be edited to delete references to legal advice, given or requested, potential defences or settlement strategy,

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42 *R.* v. *Dunbar and Logan* (1982), 138 D.L.R. (3d) 221, 69 C.C.C. (2d) 13, 28 C.R. (3d) 324 (Ont. C.A.).

43 J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1998) at 760.

44 *Vancouver Hockey Club Ltd. v. National Hockey League* (1987) 18 B.C.L.R. (2d) 91 (S.C.).

45 (1990), 47 C.C.L.I. 196 (Sask. Q.B.).

and information from the auditor's reports or expert reports which had previously been ruled privileged.[46]

(c) For the Privilege to Apply There Must Be a Common Interest

The common interest privilege protects privileged communications exchanged between a party and a non-party,[47] as well as parties to the litigation,[48] so long as the persons claiming the privilege have a common interest with respect to the litigation.

There is little precise discussion in the case law on what constitutes a "common interest." The case law does suggest that it is not necessary that the interest be identical. A "parallel" or "selfsame" interest (the latter having been acknowledged to be something less than "identical") is said to be sufficient.[49] This is consistent with the decision in International Minerals where the court, in accepting the common interest privilege, stated that the parties have a "parallel interest in the plaintiff's claim, in varying degrees."[50]

Other cases suggest that a common interest does not exist where there is a possibility that the parties claiming the interest may become adverse in interest in the future.[51] These cases also suggest that a common interest will not exist where the plaintiff has a very different type of claim against each of the parties claiming the privilege and there is a probability of a claimover.

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46 *Ibid*. at 207.

47 See for example, *Vancouver Hockey Club Ltd. v. National Hockey League, supra* note 44 and *Mitchell v. Adegbite*, [1992] B.C.J. No 2180 (B.C. S.C.) (Master) (QL).

48 See for example, *R. v. Dunbar and Logan, supra* note 42 and *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 114 D.L.R. (4th) 526 (N.S. S.C.).

49 In *Emil Anderson Construction Co. v. British Columbia Railway Co.* [1987] B.C.J. No. 165 (QL), the court stated that "[t]he terms "selfsame interest" and "identical interest" are used interchangeably with "common interest" in *Buttes Gas.* A careful reading of the decisions in that case leads me to the conclusion that "identical" is too strong a word, but "selfsame" is a good equivalent to "common" for the purposes of the doctrine."

50 *International Minerals, supra* note 45 at 207.

51 See *Lehman v. Ins. Corp. of Ireland* (1983), 40 C.P.C. 285 (Man. Q.B.) applied in *Columbos v. Carroll* (1985), 23 C.P.C. (2d) 177 (Ont. H.C.J.); rev'g (1985), 1 C.P.C. (2d) 59 (Ont. S.C. Master); see also *Joseph v. Charlie* (1991), 57 B.C.L.R. (2d) 68 (B.C. S.C.) (Master); see also *Patterson v. Howell Estate*, [1993] O.J. No 1652 (O.C.G.D.) (Master); see also *Emil Anderson Construction Co. v. British Columbia Railway Co., supra* note 49.

(d) Loss or Waiver of Common Interest Privilege

As long as a common interest privilege exists between or amongst parties, it cannot be unilaterally waived by one without the express consent of the other(s). Where the privilege lapses because the necessary mutuality of interests disappears, then either party can waive the privilege without the consent of the other. This mutuality of interests will be lost, for example, when co-defendants become adversaries in litigation.

In *R.* v. *Dunbar and Logan,*[52] the court addressed the issue of whether the common interest privilege had been lost when one of the accused, decided to testify against his co-accused. The court stated:

> ... the inapplicability of the privilege where a controversy has arisen between the parties is confined to situations in which the once jointly represented clients have become pitted against each other in litigation. No case was cited to us in which the privilege was held to be destroyed because the clients had a falling out in a proceeding at the suit of a third person.[53]

Similarly, in *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.*,[54] the court found that the common interest privilege was lost when the parties to whom it applied cross-claimed against each other.[55]

(e) When is a Written Joint Defence Agreement Necessary?

The only Canadian case which has considered "joint defence agreements" held that communications by one accused to counsel for a co-accused in the course of the preparation of a joint defence are privileged. The decision suggests that it is not necessary to have an agreement formalizing the parties' intention to rely on the common interest privilege for the privilege to apply. By contrast, in the United States numerous cases have considered joint defence agreements and suggest that although an express agreement is not required to establish the

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52 *Supra* note 42.

53 *Ibid*. at 246.

54 *Supra* note 48.

55 *Ibid*. at 535-536.

existence of the privilege, it may be difficult to assert the existence of a joint defence arrangement absent an express agreement.[56]

Given the uncertainty in Canadian law, targets of a Bureau investigation who wish to share privileged communications ought to enter into a formal Joint Defence Agreement which provides an opportunity to recite and reference all the necessary supporting facts and law and to create a record, albeit self-serving, of the context and purpose of the information exchange. Moreover, a written agreement will draw the solicitors' attention to what may or may not be outside the scope of protection and to actions that are to be taken in specific circumstances (*e.g.* if a party wishes to withdraw from the joint defence arrangement).

(f) Contents of a Joint Defence Agreement

A Joint Defence Agreement might include some or all of the following provisions:

- precise identification of all the participants;

- a "common interest" provision that reflects whether the joint defence agreement is for a limited purpose or for the entire action;

- a provision stating that privileged information may be shared among the participants to the agreement, but that all participants intend to protect the information from disclosure to plaintiffs or third parties;

- a provision stating that privileged information will be used only pursuant to the terms of the agreement (*ie*., for the purpose explicitly stated in the agreement);

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[56] See generally, R. G. Morvillo, "Modernizing Joint Defense Agreements", *New York Law Journal*, June 1, 1999, citing *United States* v. *Schwimmer*, 892 F.2d. 237 (2d Cir. 1989), citing, *inter alia*: *Matter of Bevill Bresler & Schulman Asset Management Corp*., 805 F.2d 120 (3d Cir. 1986); *United States v. Bay State Ambulance and Hosp. Rental Serv*., 874 F.2d 20 (1st Cir. 1989); and *United States v. Keplinger*, 776 F.2d 678 (7th Cir.); cert. denied, 476 U.S. 1183 (1986). In *Schwimmer* it was held that a joint defence agreement could not be inferred from the simple circumstance of a general purpose meeting held to discuss matters of common interest and that some agreement to undertake a joint strategy of representation is required to support the joint defence privilege.

- a withdrawal provision; and

- (when appropriate) optional provisions regarding the governance of delegated tasks, a waiver of conflicts of interest, or a provision indicating that the participants have read and understand all of the provisions of the agreement.[57]

[57] Adapted from Paul J. Malak, "Drafting a Joint Defense Agreement" *The Practical Litigator* (American Law Institute-American Bar Association Committee on Continuing Professional Education, 1997).