ELECTRO FEDERATION CANADA EFC

Guidelines for the Conduct of Meetings

Note:
When these guidelines refer to Electro-Federation Canada Inc. (ELECTRO-FEDERATION) it includes ELECTRO-FEDERATION's sections, committees and regions, as they may be defined from time to time.

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INTRODUCTION

It is the policy of the ELECTRO-FEDERATION to conduct its affairs and its meetings in accordance with the various laws governing competition in Canada, notably the *Competition Act*. These guidelines have been developed in order to promote familiarity and compliance with these laws and to ensure that all members are afforded an equal opportunity to promote their views at ELECTRO-FEDERATION meetings. Participating companies should circulate these guidelines to all their delegates.

ELECTRO-FEDERATION CANADA MEETINGS

Meetings are the gatherings of members at which ELECTRO-FEDERATION's business is transacted and represent the opportunity to further ELECTRO-FEDERATION's legitimate goals. Because a trade association is, by definition, often composed of a group of competitors, ELECTRO-FEDERATION meetings must be conducted to avoid even the appearance that members are discussing matters in a manner which might give rise to an unreasonable restraint of trade or otherwise violate the *Competition Act*. These guidelines apply to all ELECTRO-FEDERATION meetings, including meetings of the various Product Sectors or Committees.

A copy of these guidelines should be circulated with the sign-in roster at every meeting/conference and the ELECTRO-FEDERATION staff member in attendance should remind participants at the start of each meeting that the meeting should be conducted under these guidelines. Notes to that affect should be entered in the formal minutes of each meeting.

A. NOTICE AND AGENDA

Each ELECTRO-FEDERATION meeting must be preceded by a notice sent to the members. A copy of the meeting agenda should also be sent. This will alert the members to the business to be considered, and enable them to prepare for a productive meeting. The agenda can also alert members and staff to matters that may raise legal questions for consideration by counsel prior to the meeting.

B. PERMISSIBLE BUSINESS MATTERS

Given the broad scope of the *Competition Act*, and the diversity of possible matters dealt with at ELECTRO-FEDERATION meetings, it is a practical impossibility to exhaustively delineate, in a set of guidelines, every practice that should be followed in order to minimize *Competition Act* exposure. However, a good starting point is to avoid discussion of commercial topics with respect to prices, markets, customers, production or supply.
A summary of the most relevant provisions of the *Competition Act* is found in the later pages of these guidelines.

(i) Agreements and Resolutions

No agreement or resolution should be made involving ELECTRO-FEDERATION members where there is likelihood that such an agreement or resolution might have a predatory, exclusionary or disciplinary affect in any given market. Agreements, resolutions or attempts to coerce behaviour with respect to matters important to rivalry, such as pricing, costs, trading terms or marketing strategies are particularly likely to raise serious competition law concerns. Furthermore, where parties to an agreement or resolution are together powerful market players, there is a possibility that dealings in less competitively-sensitive areas, such as product standards, may invite investigation where a predatory, exclusionary or disciplinary affect may be demonstrated. The safest approach is to contact counsel prior to making an agreement, resolution or proposal where there is any doubt as to the appropriateness of the conduct in question.

(ii) Information Sharing

Common sense should be used with respect to what information is shared by ELECTRO-FEDERATION members. Thus, exchanges of information that can be used to reduce competition, such as exchanges of competitively-sensitive information, such as prices, costs, trading terms or marketing strategies, should be avoided. Exchanges in less competitively-sensitive areas such as statistics, credit information, definition of product standards and terminology used in the industry, cooperation in research and development and environmental protection, may be permitted by the *Competition Act*, as long as such exchanges do not have the affect of fixing prices, production or supply or of allocating markets, customers or methods of distribution. An exchange of information should also be avoided if such an exchange has the affect of preventing or lessening competition substantially in a market by, for example, restricting market entry of potential competitors. Once again, where there is any suspicion that information can be used to fix prices, production or supply, allocate markets or customers or otherwise reduce competition, counsel should be consulted prior to sharing the information.

The Competition Bureau has stated that the risk of *Competition Act* liability is reduced when parties sharing information retain the ability to determine <u>independently</u> what strategy they will follow in the applicable market. Thus, at no time should any member be coerced to participate in an information-sharing activity or to modify its business conduct in reaction to conclusions developed through information sharing. Also, ELECTRO-FEDERATION members should avoid basing their marketing strategies on ELECTRO-FEDERATION resolutions and/or information obtained at ELECTRO-FEDERATION meetings where the likely affect of basing marketing strategy on a resolution or information would be to prevent or reduce competition.

C. MINUTUES OF MEETINGS

The legal importance of minutes of ELECTRO-FEDERATION meetings must not be underestimated. They are the official record of ELECTRO-FEDERATION and represent the only contemporaneous evidence of what transpired at the meeting. Litigants and investigators will ask for them as a first priority. It is the Secretary's responsibility to ensure that the minutes are clear, complete and accurate with regard to the discussions that transpired, the action that were taken and the justification for those actions.

For the benefit of members, it should be noted that there is no such thing as a conversation "off the record" at an ELECTRO-FEDERATION meeting. The Secretary is obliged to record accurately all matters discussed. If you feel that your comments are not appropriate for recording, they probably are not proper for an ELECTRO-FEDERATION meeting and should not be made.

Finally, when an ELECTRO-FEDERATION meeting is adjourned, it should be treated as being over. Experience has shown that "informal" sessions present too great a temptation for "confidential" discussions of prohibited subjects.

D. PRESENCE OF ELECTRO-FEDERATION STAFF MEMBER

ELECTRO-FEDERATION policy requires the full-time attendance of a member of the ELECTRO-FEDERATION staff at every meeting.

If a member of the staff cannot attend the meeting, the meeting should be postponed. Staff has been instructed in the conduct of meetings and are familiar with ELECTRO-FEDERATION policies and procedures. They can alert members to situations, which pose pitfalls, which, may be innocently and unintentionally approached by the members. The presence of an ELECTRO-FEDERATION staff member is a safeguard that members must not forego.

E. ROLE OF LEGAL COUNSEL

With respect to ELECTRO-FEDERATION meetings, counsel may be asked to review, in advance, the agenda for a meeting and/or review the minutes for meetings, and, where necessary, issue a caution letter. Caution letters serve at least two functions:

(i) to alert the members to problems of policy, procedure or legal sensitivity; and

(ii) to demonstrate to an outsider that ELECTRO-FEDERATION follows procedures designed to ensure an objective and comprehensive review of its programs. Cautions are issued for constructive purposes; they are never intended to embarrass or discredit any member or staff person.

While counsel does not review the agenda or minutes for each and every meeting, review can be arranged in situations in which problems are anticipated, and management of ELECTRO-FEDERATION, or the ELECTRO-FEDERATION staff person at the meeting should contact counsel in such cases. Likewise, while counsel obviously cannot attend all ELECTRO-FEDERATION meetings, such attendance will be provided upon request.

If a subject should appear on the agenda or be raised in a committee meeting where the ELECTRO-FEDERATION staff and/or members are unsure as to its appropriateness for discussion, the discussion of that subject matter should be postponed and advice sought from counsel before proceeding any further on the particular subject matter.

PROVISIONS OF THE *COMPETITION ACT* THAT ARE MOST RELEVANT TO ELECTRO-FEDERATION MEETINGS

The *Competition Act* (Canada) (the "*Act*") is a federal statute that sets out the competition laws applicable throughout Canada. One of the primary objectives of the *Act* is to prohibit activities, including agreements or arrangements among competitors, that may operate to limit or impair competition, the operation of the free market economy and the benefits that are derived from it. The activities dealt with under the *Act* include some which may result in criminal prosecutions and others which are subject to review before the Competition Tribunal.

It is important to note that the Federal Government passed major amendments to the *Act* in 2009 (the "Amendments"). The Amendments are far reaching and represent the most significant changes to the *Act* since it was introduced in 1986. While the Federal Government has decriminalized some conduct, it has toughened the *Act*'s criminal provisions in other areas. As described further below, the most profound amendment in this regard is the introduction of a "two-track regime" for addressing anti-competitive competitor collaborations, which includes a per se criminal conspiracy offence for "hard core" cartel activities, such as price fixing, and a reviewable regime for all other anti-competitive agreements between competitors.

There are five sets of provisions in the *Act* that are most relevant to trade associations such as ELECTRO-FEDERATION, two of which are criminal (conspiracy and bid rigging) and three of which are civil in nature (anti-competitive competitor collaborations, abuse of dominant position and resale price maintenance). Each of these provisions is briefly discussed below.

F. CONSPIRACIES AND OTHER ANTI-COMPETITIVE COMPETITOR COLLABORATIONS

The criminal conspiracy provisions of the *Act* form one of the cornerstones of Canadian competition law. They prohibit agreements among competitors and/or potential competitors (i.e., collusion) which:

(i) fix, maintain, increase or control the price for the supply of a product or service (collectively, "product");
(ii) allocate sales, territories, customers or markets for the production or supply of a product; or
(iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.

In the past, agreements, such as those listed above, would only give rise to criminal liability in Canada if they "unduly" prevented or lessened competition. As a result of the Amendments, these types of agreements, with few exceptions, are now per se illegal, which means that there can be no justification for the conduct regardless of the resulting impact or consequences of that conduct. In the context of conspiracy charges, the prosecutor will only have to show intent to enter into the agreement and knowledge of its terms; the agreements' effect will be irrelevant.

Also, note that an agreement need not be implemented in order for a violation of the conspiracy provisions of the *Act* to exist.

It is also important to note that circumstantial evidence is sufficient to convict under the *Act*'s conspiracy provisions, i.e., no "smoking gun" is required in these cases. Evidence of an implied "meeting of the minds" could form the basis of a conspiracy allegation. As such, ELECTRO-FEDERATION and its members should avoid any perception of potential wrongdoing under the *Act*, as even a seemingly innocent interaction or communication could become contentious if it is followed by what is perceived to be coordination between the ELECTRO-FEDERATION members.

Thus, exchanges between ELECTRO-FEDERATION members of competitively-sensitive information should be avoided at all times. Also, any alteration of market conduct on the part of an ELECTRO-FEDERATION member that is perceived by the Competition Bureau to reduce competition and that may be attributed to an ELECTRO-FEDERATION resolution or information exchange may invite prosecution under the conspiracy provision. Thus, it is important for ELECTRO-FEDERATION members to maintain independence between ELECTRO-FEDERATION resolutions and information and their marketing and operational strategies.

The *Act* recognizes, however, that not all discussions among competitors are necessarily harmful to competition. The Competition Bureau has acknowledged that trade associations can serve legitimate functions, and at the same time comply with the law. Accordingly, not all agreements between competitors are illegal and discussion of certain subjects is permitted under the *Act*, subject to certain limitations.

In light of the above, it is essential that all ELECTRO-FEDERATION members realize that it is important to each of them as members, as well as to the integrity of ELECTRO-FEDERATION as a whole, that the rules established under the *Act* be strictly observed at all times. In addition to the possibility of adverse publicity for individual members and ELECTRO-FEDERATION, a conviction under the conspiracy provisions of the *Act* may result in fines up to $25 million and imprisonment for up to 14 years for the individuals involved. In addition, the *Act* permits anyone who has suffered a loss as a result of a conspiracy to seek damages through a civil action.

With respect to non-"hard core" cartel activities (i.e., agreements between competitors that do not fix prices, allocate markets or customers or restrict production or supply), such agreements can nonetheless be reviewed by the Commissioner of Competition under the reviewable provisions of the *Act*, to determine whether they are likely to result in a substantial lessening or prevention of competition. On application by the Commissioner of Competition, the Competition Tribunal may prohibit any person, whether or not a party to the agreement, from doing anything to give effect to such an anti-competitive agreement. The Tribunal does not, however, have the power to levy fines or penalties in these matters.

G. BID RIGGING

The submission of bids in response to a request for bids or tenders, whereby two or more companies or persons agree, without the knowledge of the person calling for or requesting the bids or tenders, to set the terms under which the tender will violate the "bid rigging" provisions of the *Act*. There are no qualifications or defenses to this prohibition; it is outright or *per se* illegal. The bid rigging offence may be committed by parties either agreeing on the price to be submitted by them in response to a call for bids, or by entering into an arrangement whereby one or more of them agrees not to tender in response to a call for bids or agrees to withdraw a submitted bid. No harm need result for conviction to occur for bid rigging. It is not a bid rigging offence where a joint bid is made known to the person requesting the bid.

H. RESALE PRICE MAINTENANCE

It is an offence for a supplier to attempt to influence upward, or to discourage the reduction of the price at which any other person engaged in business supplies or offers to supply or advertises a product within Canada, if such an attempt is made by means of agreement, threat, promise or any like means and such conduct has had, is having or is likely to have an adverse effect on competition in a market. The phrase "agreement, threat, promise or like means" has been given a wide scope by courts; even seemingly innocuous behaviour, such as a request or a "strong suggestion" to sell at a certain price has been interpreted in certain circumstances as a threat. Thus, any suggestion about pricing by others should be avoided at ELECTRO-FEDERATION meetings.

I. ABUSE OF DOMINANT POSITION

If a firm or a group of firms has substantial or complete control of a class or species of business and if the firm or firms engage in a practice of anti-competitive acts, that have led to, or are likely to lead to a substantial lessening of competition, the Commissioner of Competition may apply to the Competition Tribunal for an order, including that the practice cease and/or that positive measures be taken to restore competition in the market. The Competition Tribunal may now also levy administrative monetary penalties (*i.e.*, fines) for cases of abuse of dominance.

The Bureau has stated that it considers any *act*, the intended affect of which is predatory, exclusionary or disciplinary to be within the scope of the abuse of dominance provision. Moreover, it is not necessary for there to be a specific agreement for an abuse of dominance to exist and proof of abuse of dominance need only be made according to the civil standard of a balance of probabilities, as opposed to beyond a reasonable doubt, as required for conspiracies and bid rigging. ELECTRO-FEDERATION members should therefore ensure that no actions taken by the ELECTRO-FEDERATION can be perceived as predatory, exclusionary or disciplinary. The *Act* states several examples, including:

(i) buying up of products to prevent the erosion of existing price levels;
(ii) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent their entry into, or to eliminate them from, a market;
(iii) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
(iv) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

CONCLUSION

Though the foregoing may seem pretty overpowering for the lay reader, it must be emphasized that the *Competition Act* is not a bogey-man. It is there to discourage limitations on competition; but it is not meant to unnecessarily restrict normal commercial intercourse between business people. Indeed, the *Competition Act* envisages, if not encourages, trade associations and specifically permits certain types of behaviour outlined above as long as they do not inhibit the basic pillars of free competition, being pricing, production and marketing.

Accordingly, business representatives can indeed have a drink with their competing colleague or even play a round of golf from time to time.

In very broad terms, the statute is not frowning on discussion of business matters but rather on agreement as to the conduct of market behaviour. Though discussion can, of course, lead to agreement, common sense should tell the astute businessperson when he/she is chatting and when, to go further, he/she would be colluding.

Obviously, business people should not do anything to limit the ability to independently establish prices and production levels, chase customers and obtain inputs at the lowest possible cost. What is forbidden is to diminish the present intensity of the existing level of competition and, as long as activity is a matter of individual choice, one is unlikely to breach the anti-collusion rules of the statute. For example, an individual can normally decide who to sell to and who not to sell to and which potential customer to pursue and which not to pursue. It is only when there is collective or collusive action in this regard that the statute may be violated. Thus, one needs to be careful, but not be paranoid.

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