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MAR 09 2006

Attention: James B. Musgrove

Dear Mr. Musgrove:

I am writing in response to your letter dated January 23, 2006, in which you request a written opinion on the application of sections 45 and 61 of the *Competition Act* (the "Act") to the proposed Residential Real Estate Services Fees Schedule for Ontario lawyers ("Suggested Fee Schedule").

The Program of Written Opinions seeks to facilitate compliance with the Act by indicating whether a proposed conduct or practice would provide the Commissioner of Competition ("Commissioner") with sufficient grounds to commence an inquiry on her own initiative pursuant to paragraph 10(1)(b) of the Act. You should understand that the Commissioner has no authority to decide the law. In addition, you should be aware that the Commissioner, under certain circumstances, is obliged to commence an inquiry under paragraphs 10(1)(a)<sup>1</sup> and 10(1)(c)<sup>2</sup> of the Act.

This opinion has been prepared based on the information provided and taking into account current jurisprudence and the stated policies of the Bureau.

Based on the information that you have provided in your request and in

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<sup>1</sup> Paragraph 10(1)(a) provides that the Commissioner shall make inquiry to a six Canadian residents application under section 9 of the Act where she considers it necessary to do so with the view of determining the facts.

<sup>2</sup> Paragraph 10(1)(c) provides that the Minister may direct the Commissioner to commence an inquiry.

your supplementary information letters, dated January 30, 2006 and February 6, 2006, it is my opinion that the publication and dissemination of the proposed Suggested Fee Schedule, without more, would not provide the Commissioner with sufficient grounds to commence an inquiry under section 10 of the Act. This said, the Commissioner does retain a concern that the promulgation of the Suggested Fee Schedule could lead to future conduct that might reasonably become the subject of an inquiry under sections 45 and 61 of the Act.

## **Background**

I understand the facts to be as follows:

The Working Group on Lawyers and Real Estate (the "Working Group") is comprised of representatives of the following three organizations:

1. the County and District Law Presidents Association ("CDLPA");
2. the Ontario Bar Association ("OBA");
3. the Ontario Real Estate Lawyers Association ("ORELA").

A report by the Law Society of Upper Canada's ("LSUC") Sole Practitioner and Small Firm Task Force, finalised in 2005, revealed that more than half of Ontario's lawyers practice in small firms. In addition, the report showed that 46% of small practitioners practice some amount of real estate work with a particular emphasis on residential real estate. In the light of this information, the Working Group has developed a set of practice standards designed to be a guide for Ontario lawyers who conduct work related to residential real estate transactions. This process is part of the Working Group's overall effort to improve the professionalism of lawyers working in this area and to educate the public about the role and benefits of lawyers in relation to residential real estate transactions.

The Working Group has also developed a "Suggested Fee Schedule" to be included in the set of practice standards. A copy of that document, originally provided to the Bureau as "Exhibit 4" to your letter of January 23, 2006, was replaced with a subsequent "Suggested Fee Schedule" that you provided to us under cover of your letter of February 6, 2006. Unlike its predecessor, the second schedule does not contain phrases such as "minimum fee" or "not less than". Such references are suggestive of a mandatory minimum fee. Any such suggestion would raise concerns as to whether this fee schedule is a directive and moreover, whether non-adherence to the fee schedule would result in lawyers being sanctioned or disciplined in some manner.

I have based my opinion on this subsequent fee schedule (hereinafter the fee schedule) rather than its predecessor. For greater certainty, I have attached a copy of the fee schedule to this written opinion.

In your letter of January 23, 2006, you state by way of assurances, that the fee schedule will not be mandatory. Your letter also declares that “[l]awyers will not be sanctioned, policed, punished, or any way disadvantaged because they do not follow the suggested fee schedule”.

In addition, the preface to the fee schedule makes the following explicit statement:

“...the fees set out herein are, of course, only suggestions. Solicitors and their clients are free to negotiate any lawful fee arrangements, whether or not in accordance with this schedule, with no adverse consequences or repercussion.”

I wish to emphasize to you that the referenced assurances and statement in the fee schedule as to the voluntariness of its use are key to this opinion on the application of sections 45 and 61 to your proposal.

I am encouraged that the fee schedule is clearly identified as “recommended”. This lends some interpretive support that the fee schedule as a whole is not a directive and carries with it no expectation of other than voluntary adherence. The fees listed in respect of the itemized services (1 through 4) likewise are all qualified as “recommended”. We suggest, however, that the explicit statement referenced above in the preface as to the non-mandatory nature of the fee schedule be repeated under each of the itemized services listed in the schedule. This is appropriate and reinforces, for anyone consulting information respecting each of these itemized services, that the fees are recommended.

As a final background note, I would like to make it clear to you that this opinion does not in any way apply to the rules, regulations or activities of the Law Society of Upper Canada. I make this point in order to alleviate any confusion that might arise from the fact that the fee schedule refers to that organization’s Rules of Professional Conduct dealing with fees charged by solicitors.

## Analysis

### Section 45 (Conspiracy)

For an offence to be committed under section 45, there must be an agreement or arrangement to prevent or lessen competition unduly or to enhance prices unreasonably. In providing you with my opinion in respect of the application of these provisions to your proposal, I am guided by the legal principles established in judicial precedents, including the judgment of the Supreme Court of Canada in *PANS*.<sup>3</sup> This jurisprudence indicates that an offence under section 45 of the Act involves three principal elements:

1. the parties must have entered into a conspiracy, combination, agreement or arrangement (“agreement”);
2. the agreement, if implemented, would or would likely have the effect of preventing or lessening competition unduly or enhancing prices unreasonably;
3. the parties had the intention to enter into the agreement and had knowledge of its terms, and knew or should have known that the agreement would or would likely have such proscribed effect.

Based on the information that you have provided, I have concluded that there is nothing to suggest a conspiracy, combination, agreement or arrangement to fix or control fees with the effect of preventing or lessening competition unduly or of enhancing unreasonably the fees charged. The “recommended” fee schedule is by way of a suggestion; adherence or departure from the fee schedule is at the option of the parties involved, and subject to no adverse consequences.

I would like to advise you that this does not alleviate all of the Commissioner’s concerns. The Bureau has, in the past, looked to something more than the mere existence of an agreement in respect of a suggested fee schedule as a basis for triggering an investigation under s. 45 of the Act. However, the formulation and implementation of a suggested fee schedule risks facilitating an agreement on prices or promoting adherence to a specified level of fees. In investigating and prosecuting an alleged price-fixing agreement, a suggested (or “recommended”) fee schedule might constitute relevant and admissible evidence of an unlawful common design.

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<sup>3</sup> *R. v. Pharmaceutical Association of Nova Scotia* [1992] 2 S.C.R. 606

### Section 61 (Price Maintenance)

Under paragraph 61(1)(a) of the Act, it is an offence for a business person to attempt, by means of a threat, promise, agreement or any like means, to influence upwards the prices at which another business person supplies, offers to supply, or advertises a product. Persuasion alone is not sufficient for a conviction under this provision.<sup>4</sup> To be unlawful, an attempt to influence prices must be by one of the prohibited means.

Under paragraph 61(1)(b), it is an offence for a business person to refuse to supply a product to, or otherwise discriminate against, another business person because of the low pricing policy of that other person.

Under subsection 61(6), it is an offence to induce a supplier to refuse to supply a product to another person because of the low pricing policy of that other person.

Based on the information that you have provided, I am of the view that the fee schedule, by itself, would not constitute a violation of section 61 of the Act. I particularly note that this document contains no promise of favour, or threat of retribution, in relation to a practitioner's decision as to whether or not to follow the fee schedule. To the contrary, the document emphasizes the voluntariness of the fee recommendations. Further, this document alone would not likely cause a non-conforming practitioner to be denied supply of a product (such as association services) or otherwise to be discriminated against.

### **Some Cautionary Notes**

I note that the preface of the fee schedule makes reference to a "fair and reasonable charge for the services of a solicitor". Similar references are found in other Working Group documents that you provided to us, in particular, Exhibits 1 and 2 to your letter of January 26, 2006. How member practitioners might interpret such references remains a concern to us, and I recommend that you reconsider the use of such terminology. There should be no impression left with practitioners that only by charging the recommended fees will practitioners be considered to be charging for services in a fair and reasonable manner.

Your letter of January 23, 2006 requesting this opinion enclosed a copy of an address by Calvin Goldman, a former Director of Investigation and Research (as the position of Commissioner of Competition was then known). The caution I have registered in this opinion as to the use of recommended fee schedules, insofar as these may encourage and facilitate price co-ordination, was articulated in this address to the Canadian Bar Association (Ontario) Program on the

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<sup>4</sup> *R. v. Schelew* (1984) 78 C.P.R. (2d) 102 (N.B.C.A.); *R. v. Salomon Canada Sports Ltée* (1986) 28 C.C.C. (3d) 240; *R. v. Must de Cartier Canada Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.)

Professions in 1989 where Mr. Goldman stated:

“Strictly speaking, it is possible to implement a suggested fee schedule which raises no issue under the Act. However, my officers and I have consistently cautioned professional groups that even without the implementation of disciplinary measures to enforce a fee schedule, it is not easy to formulate and implement a fee schedule without risking violation of the conspiracy provisions. This risk arises because of the ease with which such a schedule may be used to establish or facilitate an agreement on prices or promote adherence to a specified level of fees.”

In your letter of January 23, 2006 you state that the fee schedule will be the basis for further consultation with real estate lawyers. I have noted that the consultation process is being run in parallel with the Law Society of Upper Canada, which is also consulting members of the profession with respect to real estate practice standards and guidelines, and possible changes to their *Rules of Professional Conduct*. Following the Law Society consultation sessions, the Working Group and its participating associations plan to conduct a series of consultation sessions with practitioners in various Ontario locations.

It goes without saying that any meetings among competitors on the subject of fees could lead to inferences of unlawful collusion. Consequently, it is imperative that the consultations be conducted in a manner that would avoid any inference of an agreement to charge the recommended fees, or pressure to do so. The risk that such adverse inferences could be drawn from the circumstances can be reduced by apprising participants of the relevant provisions of the *Competition Act*, and by making it abundantly clear to them that no practitioner is required to follow the fee schedule. Further, all consultation sessions should be closely monitored to ensure that the discussions do not migrate into areas that are fraught with risk, such as the state of competition in the industry or the presence of “discounters” in the market. There also should be no discussions of any purported link between low fees and the provision of inadequate service. It would be prudent to caution practitioners not to attempt to coerce or induce other practitioners to abide by the fee schedule.

I take this opportunity to caution you in respect of these consultations so as to insure that these be conducted so as to avoid promotion of any adherence to a particular fee level or to facilitate agreement among members of the profession on fees to be charged for legal services. A shift in fee practices, suggestive of concerted action, could prompt an examination by the Commissioner, for example, if a significant number of members were observed to move to the recommended fee levels further to these consultations where price variations previously had been the norm.

## **Conclusion**

This opinion is based on the interpretation of existing jurisprudence and predicated on the assumption that no material facts have been omitted or misrepresented in your submission and that our understanding of the facts is accurate. This opinion is binding so long as the facts are accurate, the material facts remain unchanged, the conduct is carried out as proposed, and the law and jurisprudence remain unchanged. Should any of these factors change, you should apply for a new opinion.

In the light of the cautions raised, I would ask that you keep the Commissioner advised of any future development and promulgation of the fee schedule by the CDLPA, OBA and the ORELA.

If you have any other questions or require clarification of this letter, please do not hesitate to contact Colette Morin-Wade of the Criminal Matters Branch at (819) 934-5648.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Denyse MacKenzie', written in a cursive style.

**Denyse MacKenzie  
Senior Deputy Commissioner  
of Competition  
Criminal Matters Branch**

Attach.

**Working Group on Lawyers and Real Estate  
Suggested fee schedule  
Real estate transaction**

**Preface**

The question of what is a fair and reasonable charge for the services of solicitors is a matter of concern to everyone involved, the client, the Court and the solicitor. To this end and as a guide, not only to solicitors who practice in Ontario, but also to clients and the Courts, the Working Group on Lawyers and Real Estate, comprised of representatives of the Ontario Bar Association, the County and District Law Presidents Association and the Ontario Real Estate Lawyers Association (the "Working Group") are publishing this fee schedule. However, this is only a suggested fee schedule for matters of average complexity. The circumstances of any particular retainer, the client needs, and the specific arrangements struck with the client will govern in each case. The Law Society of Upper Canada's Rules of Professional Conduct deal with fees charged by solicitors. Specifically, Rule 2.08 and associated Commentary deals with solicitors' fees and disbursements. The Rules of Professional Conduct are available at the Law Society of Upper Canada's website: [www.lsuc.on.ca](http://www.lsuc.on.ca).

As well, as has always been the case, lawyers frequently offer their services at reduced rates or without fee, in appropriate circumstances. Such public service, which continue to characterize the bar throughout Ontario, is to be encouraged. This suggested fee schedule relates to fees in cases where circumstances do not dictate a reduced or waived fee.

This suggested fee schedule for solicitors is amended from time to time by the Working Group taking into account changed conditions. The Working Group prepared the suggested fee schedule for solicitors as of the spring of 2006. The suggested fee schedule for solicitors set out below incorporates changes recommended by the bar and the Working Group members, which included Clare Brunetta, Fort Frances (Co-Chair); Raymond G. Leclair, Ottawa (Co-Chair); Sally Burks, Ottawa; Kim Little, London; Paul Dixon, Hamilton; Maurizio Romanin, Toronto; Jerry Udell, Windsor and Kathleen Waters, Toronto. Any suggested fee is, of course, exclusive of GST and proper disbursements.

Finally the fees set out herein are, of course, only suggestions. Solicitors and their clients are free to negotiate any lawful fee arrangements, whether or not in accordance with this schedule, with no adverse consequences or repercussion.

**Recommended Fee Schedule**

**1- Purchase and one mortgage of residential properties (including recreational property for personal use):**

To complete the transaction in accordance with the Practice Guidelines issued by the Law Society of Upper Canada, including, Purchaser's solicitor for reviewing executed agreement of purchase and sale (but not including negotiating or drafting agreement) and advising in connection therewith, investigating title and checking the description, making requisitions on title and on other matters recited in the agreement; searching the arrears of realty and all other taxes and rates constituting statutory liens; advising on the applicability of GST legislation; searching for executions; searching for work orders,



discussing with the purchaser all matters relating to title, zoning and statement of adjustments; reviewing and executing mortgage instructions; advising the client concerning insurance requirements; advising the client with respect to Rule 2.02(10)-(13) of the Law Society of Upper Canada and options for assuring title, including solicitor's opinion letter and title insurance; where appropriate in rural properties, advising client with respect to road access, shore allowance, septic issues, water potability and well issues; attending on execution of documents, attending to the closing, giving opinion on title or securing title insurance policy, reporting and all other services necessarily incidental thereto:

On the sale price of the property (inclusive of encumbrances to be assumed)  
**\$XXX,000 (Base Value)** or less .....**\$xxx.00 (Recommended Fee)**

on the excess over **\$XXX,000**, up to a total sale price of **\$YYY,000 (Second Value)** approximately **?? (1<sup>st</sup> Level Rate)** of 1 per cent of the said excess, to be determined by the time spent, the complexity of the transaction and the amount involved.

on the excess over **\$YYY,000** approximately **?? (Second Level Rate)** of 1 per cent of the said excess, to be determined by the time spent, the complexity of the transaction and the amount involved.

## **2- Purchase and one mortgage of residential condominium properties:**

To complete the transaction in accordance with the Practice Guidelines issued by the Law Society of Upper Canada, including, Purchaser's solicitor for reviewing executed agreement of purchase and sale (but not including negotiating or drafting agreement) and accompanying documents, including declaration, by-laws, management contract, insurance trust agreement and all other condominium documentation, advising in connection therewith, investigating title and checking the description, making requisitions on title and on other matters recited in the agreement; searching for arrears of realty and all other taxes and rates constituting statutory liens; advising on the applicability of GST legislation; searching for executions; searching for work orders; examining condominium unit plan; reviewing transfer, obtaining and reviewing status certificate and related documents and statements from and concerning the condominium corporation as to its financial condition and other matters relevant to the transaction discussing with the purchaser all matters relating to title, zoning, statement of adjustments, condominium registrations and amendments thereto, common expenses, insurance coverage, boundary limits of condominium unit and responsibility and participation in condominium corporation; advising the client with respect to Rule 2.02(10)-(13) of the Law Society of Upper Canada and options for assuring title, including solicitor's opinion letter and title insurance; where appropriate in rural properties, advising client with respect to road access, shore allowance, septic issues, water potability and well issues; considering and advising on occupancy agreement; attending on execution of documents, attending to the closing (interim closing extra), giving opinion on title or securing title insurance policy, reporting and all other services necessarily incidental thereto:

On the sale price of the property (inclusive of encumbrances to be assumed)  
**\$XXX,000** or less .....**\$xxx.00 (Recommended Fee)**

on the excess over **\$XXX,000**, up to a total sale price of **\$YYY,000** approximately **??** of 1 per cent of the said excess, to be determined by the time spent, the complexity of the transaction and the amount involved.

on the excess over \$YYY,000 approximately ?? of 1 per cent of the said excess, to be determined by the time spent, the complexity of the transaction and the amount involved.

**3- Sale of residential properties (including sale of recreational property for personal use)**

To complete the transaction in accordance with the Practice Guidelines issued by the Law Society of Upper Canada, including, Vendor's solicitor for reviewing executed agreement of purchase and sale (but not including negotiating or drafting agreement) and advising in connection therewith, preparing transfer, answering requisitions on title, preparing statement of adjustments and advising in connection therewith, advising on the applicability of GST legislation, reviewing charge taken back (if any), attending on execution of documentation, attending to the closing and completing the sale, reporting to client and all other services necessarily incidental thereto:

On the sale price of the property (inclusive of encumbrances to be assumed)  
.....?? of the recommended fees as in Item 1

**4- Sale of residential condominium unit**

To complete the transaction in accordance with the Practice Guidelines issued by the Law Society of Upper Canada, including, Vendor's solicitor for reviewing executed agreement of purchase and sale (but not including negotiating or drafting agreement) and advising in connection therewith, preparing transfer, answering requisitions on title, preparing statement of adjustments and advising in connection therewith, advising on the applicability of GST legislation, supplying or arranging for copies of condominium status certificate and related documents, including the declaration, by-laws, management contract, insurance trust agreement, up-to-date insurance certificate, preparing transfer, reviewing charge taken back (if any), attending on execution of documentation, attending to the closing and completing the sale, reporting to client and all other services necessarily incidental thereto:

On the sale price of the property (inclusive of encumbrances to be assumed)  
.....?? of the recommended fees as in Item 1

**5- Negotiating purchase or sale of property**

Purchaser's or vendor's solicitor for negotiating the terms of a purchase or sale of property which may include finding a vendor or purchaser, the fee to be determined by the time spent, the complexity of the transaction, the amount involved and the result obtained.

**6- Drafting agreement of purchase and sale**

Drafting the agreement of purchase and sale including attendance to take instructions and execution (but not including negotiating the terms of the agreement), the fee to be determined by the time spent, the complexity of the transaction and the amount involved.