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Proposed Changes to the Competition Bureau's Immunity Program Will Undermine Effective Cartel Enforcement in Canada

Comments of McMillan LLP on the Consultation Draft dated October 26, 2017

Executive Summary

McMillan LLP[1] believes that several proposed revisions to the Immunity Program under the *Competition Act*[2] will have the unintended but serious consequence of decreasing applications for immunity and undermining the effectiveness of anti-cartel enforcement in Canada.

The provisions relating to (a) recording of proffers, (b) individual identification of potentially culpable corporate personnel, (c) more frequent and earlier use of recorded interviews, and (d) the apparent requirement to disclose privileged internal investigation work-product, will create substantial disincentives for Canadian companies to assist the Competition Bureau and the Public Prosecution Service of Canada by self-reporting illegal conduct in exchange for immunity from prosecution. The requirements are particularly incompatible with international cartel investigations and will discourage companies that are self-reporting in the United States, European Union and other jurisdictions from making parallel applications in Canada.

These changes are not necessary for effective investigation and prosecution of cartel conduct. While prosecutors may consider that such changes would make it easier to prosecute contested cases, the likely result will be that significantly fewer cartels are actually investigated and prosecuted.

The Importance of Immunity Programs

Immunity applications are the source of almost all the Competition Bureau's cartel investigations. Since Canada introduced its first effective immunity program in 1991,[3] over 200 guilty pleas and convictions have yielded total fines in excess of $370 million and deterred other companies from engaging in cartel conduct that injures Canadian consumers.

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[1] McMillan is a full service Canadian business law firm with offices in Montréal, Ottawa, Toronto, Calgary and Vancouver, as well as in Hong Kong. We have an active practice in all aspects of competition law, including the representation of parties who are investigated or prosecuted under the criminal provisions of the *Competition Act*. Members of our firm also have significant experience working for or representing public sector enforcement authorities, including two partners (one now retired) who were PPSC prosecutors that handled numerous domestic and international cartel prosecutions. We have participated, either directly or through submissions made by the Canadian Bar Association or American Bar Association, in all previous public consultations relating to the Competition Bureau's Immunity (and related Leniency) Program.

[2] Competition Bureau, "Public Consultation Document – Immunity Program under the *Competition Act*" (26 October 2017) (the "**Consultation Draft**"), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04316.html>.

[3] Known then as the "Cooperating Parties Program", which became the Immunity Program in September 2000.

There is a strong global consensus that cartel activity is unequivocally negative and merits vigorous competition law enforcement. For example, the International Competition Network has observed that:

> [t]he harmful effects of hard core cartels are well understood. Consumers benefit from competition through lower prices and better products and services. When competitors agree to forego competition for collusion, consumers lose those benefits. The competitive process only works when competitors set prices independently. Secret cartel agreements are a direct assault on the principles of competition and are universally recognised as the most harmful of all types of anticompetitive conduct.[4]

Similarly, the Competition Bureau views price-fixing activity as a "fraud on the market"[5] and has made it a top enforcement priority. The Government reflected these concerns in the 2009 amendments to the *Competition Act*, raising the maximum penalty for cartel conduct to $25 million per count charged and the maximum term of imprisonment to 14 years (the most serious potential penalty for an economic crime in Canada, comparable to the maximum penalties for certain types of treason and sexual assault).[6]

Cartel activity is inherently secretive and extremely difficult for enforcement authorities to detect. Even if detected, successfully investigating and prosecuting companies or individuals for cartel offences often requires witness testimony and records that are difficult to obtain in the absence of cooperation from cartel participants. These challenges are magnified for Canadian authorities when the conduct occurs internationally, since witnesses and records are beyond their jurisdiction.[7]

There has been widespread adoption of immunity, amnesty and leniency programs, in Canada and around the world, to achieve effective anti-cartel enforcement. As the ICN has recognized:

> [l]eniency encourages cartel participants to confess their cartel conduct and implicate their co-conspirators, providing first-hand, direct "insider" information or evidence of conduct. Leniency programs help to uncover conspiracies that would

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[4] International Competition Network ("**ICN**") Working Group on Cartels, "Defining Hard Core Cartel Conduct; Effective Institutions; Effective Penalties" (Report presented at the ICN 4th Annual Conference, Bonn, Germany, 6-8 June 2005) at 1, online: <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>. The Competition Bureau is a leading member of the ICN, with two former Commissioners having chaired its steering committee and the Bureau providing extensive secretariat support for the ICN's operations.

[5] Competition Bureau, Backgrounder, "Competition Bureau uncovers gasoline cartel in Quebec" (12 June 2008), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02693.html>.

[6] *Criminal Code*, RSC 1985, c C-46, ss 46(2)(b),(e), 47(2)(c) and 271(a).

[7] Mutual legal assistance treaties and extradition procedures have significant limitations, are resource-intensive and are not a practical option in most cases.

> otherwise go undetected and can destabilise existing cartels. They also act as a deterrent to those contemplating entering into cartel arrangements.
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> In addition, information or evidence can be obtained faster by competition agencies, and at a lower direct cost, compared to other methods of investigation, leading to more efficient resolution of cases, even if additional investigative measures are carried out.[8]

The Competition Bureau has consistently emphasized that the Immunity Program together with its Leniency Program are its most important tools for detecting and investigating cartel conduct.[9] Its November 2017 submission to the OECD stated that:

> [t]he Bureau's Immunity Program, which was formalized in 2000, has proven to be the Bureau's single most powerful means of detecting criminal cartel activity. The goal of the Immunity Program is to uncover and stop criminal anti-competitive activity prohibited by the Act and to deter others from engaging in similar behaviour.
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> The Immunity Program's continued appeal to those who would otherwise remain undercover is pivotal to the Bureau's enforcement efforts.[10]

Without an effective Immunity Program, the Bureau will lose what it acknowledges is its most effective weapon for detecting and deterring cartel conduct.

Fundamental Principles for Effective Immunity Programs

The primary purpose of Canada's Immunity Program, along with the numerous similar programs operated by enforcement agencies around the world, is to encourage companies and individuals to come forward and help the authorities take enforcement action against undetected illegal cartel conduct. Whether parties choose to do so depends on an overall assessment of the benefits of immunity or leniency relative to the costs and disadvantages

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[8] ICN Cartel Working Group Subgroup 2: Enforcement Techniques, "Anti-Cartel Enforcement Manual Chapter 2: Drafting and Implementing an Effective Leniency Policy" (April 2014) at section 2.2, online: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf> [Anti-Cartel Enforcement Manual].

[9] See e.g. Competition Bureau, News Release, "NGK to Pay $550,000 for Rigging Bids for Car Parts" (13 December 2017), online: <https://www.canada.ca/en/competition-bureau/news/2017/12/ngk_to_pay_550_000forriggingbidsforcarparts.html>.

[10] Competition Bureau, Technical Guidance Document, "Competition Bureau Submission to the OECD Competition Committee Roundtable on the Use of Markers in Leniency Programs" at the section titled "Immunity Program" (27 November 2017) (emphasis added), online <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03838.html>.

resulting from participation in such a program. In international cases, the implications of the Canadian program requirements for a party in the United States, the European Union or other jurisdictions but whose conduct has had an economic impact in Canada will also be important in deciding whether or not to include Canada in an international self-reporting strategy.

In order to incentivize self-reporting, immunity programs must adhere to two core principles:

(i) **Certainty, Transparency and Predictability** – An immunity applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports the cartel activity to authorities.[11]

(ii) **No Worse Off** – Immunity programs should be designed so that immunity applicants are in no less advantageous positions than cartel participants who do not cooperate with the competition authority.[12] This is particularly relevant in respect of civil cases that often arise concurrently with criminal investigations in Canada, the United States and other jurisdictions. The use of a "paperless process" to minimize the creation of additional material that is discoverable in civil litigation is an important element of effective immunity programs and one that has historically been embraced by the Bureau.

The Problematic Policy Changes

While the Bureau's Immunity Program has generated a high volume of investigations, guilty pleas and convictions, it appears that two recent unsuccessful prosecutions have motivated proposals to amend the Immunity Program to make prosecutions easier. However, four of the proposed changes are neither necessary nor desirable to achieve effective anti-cartel enforcement and will instead reduce certainty and make applicants worse off, thereby discouraging the applications for immunity that give rise to opportunities for successful prosecutions.

(a) Recording of Proffers

The Consultation Draft proposes that proffers by legal counsel will be recorded.[13] This change is not necessary nor desirable in order to investigate and prosecute cartels effectively, and it is a serious departure from the No Worse Off (paperless process) principle and the Certainty principle.

Proffers are not evidence. They are a good faith effort by cooperating parties, through their legal counsel, to provide the authorities with an overview of what actual evidence is

[11] Anti-Cartel Enforcement Manual, *supra* note 8 at section 2.3.
[12] ICN Cartel Working Group, "Checklist for Efficient and Effective Leniency Programs" (2017) at section 4, online: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1126.pdf>.
[13] Consultation Draft, *supra* note 2 at para 61.

expected to be available from a cooperating party's records and/or personnel. In order to advance a prosecution, investigators and prosecutors must obtain, review and evaluate the actual evidence. Difficulties encountered in litigated cases have arisen not from proffers, but from a failure to assemble and test the actual evidence rigorously and expeditiously.

Proffers cannot be used as affirmative evidence in a criminal prosecution. In our respectful view, they also would not be usable in a prosecution of a witness for perjury or obstruction of justice as they are statements by a party's lawyer, not by a witness. There is no prosecutorial upside to having a recorded proffer. However, such a recording may be ordered to be disclosed to counsel for other parties charged with an offence, and may thereby provide additional opportunities for Crown witnesses to be challenged on cross-examination.

The Bureau and PPSC apparently view proffers as somehow akin to quasi-contractual commitments. But a party and its counsel cannot be forced to deliver evidence that exactly conforms to a proffer. Additional documentary evidence may emerge that affects what has been proffered, and when individuals are interviewed or called to testify, they may not say exactly what was proffered. The prospect that immunity may not be granted or may be revoked when evidence differs from a recorded proffer would create uncertainty which would be a disincentive to potential cooperating parties from becoming immunity applicants.

From a cooperating party's point of view, the recording of a proffer (and the possibility that transcripts of the recording may also be prepared) creates a record that may be subject to discovery requests in civil litigation in Canada as well as in foreign jurisdictions such as the United States when the case involves international conduct. This has the potential to cause an immunity applicant to be significantly worse off than had it not become a cooperating party. It will be a particularly strong deterrent for parties involved in international cartel conduct to forego self-reporting in Canada.

In short, recording proffers by counsel would provide no practical or judicial benefit to prosecutors, may undermine a prosecution, and is inconsistent with the No Worse Off (paperless process) principle.

We recommend that the Immunity Program clarify that proffers are not evidence and will not be recorded. Instead, the Immunity Program should specify that a cooperating party and its counsel are expected to proceed in good faith and exercise due diligence in the proffer process, and that the powerful remedy of denying or withdrawing immunity will be used in the rare cases where a party fails to do so.

(b) **Individual Identification of Potentially Culpable Corporate Personnel**

The Consultation Draft proposes to abandon the policy of automatically providing protection against prosecution to all the employees of a cooperating party, conditional upon them personally providing full cooperation as and when relevant in the Bureau's and PPSC's investigation and prosecution of other parties. Instead, the Consultation Draft proposes a

bureaucratic regime in which immunity will only be provided to those individuals who specifically come forward and provide a confession regarding their personal involvement in the commission of an offence during the corporation's immunity application process.[14] This change is not necessary or desirable for effective cartel enforcement. It is inconsistent with the Certainty and No Worse Off principles. It would be a particularly strong disincentive for parties involved in complex international investigations to self-report in Canada.

The availability of immunity for all cooperating personnel has been one of the critical positive incentives offered in Canada's Immunity Program. Such protection would be expected by any company that is considering self-reporting in a jurisdiction such as Canada with parallel corporate and individual exposure to criminal prosecutions and no statute of limitations for indictable offences. It allows corporate immunity applicants to tell their personnel that they will, individually, not face prosecution, and therefore should cooperate fully. This benefits the competition authorities as well as the cooperating party by helping to encourage candour and cooperation during an internal investigation process.

The proposed policy change would introduce uncertainty regarding individual immunity determinations as well as add significant process complications and burdens for cooperating parties in cases where numerous individuals may have potential exposure in Canada. There is no need or offsetting benefit from shifting to person-by-person processing of immunity coverage.

Cartel investigations and prosecutions evolve in response to evidence from multiple sources, often over an extended period of time. In many cases, there may be numerous individuals within a company who have some involvement in a cartel offence. However, plea bargains are often negotiated with parties under investigation, before or after charges are laid. As a result, cooperation through interviews and testimony from many of the employees with relevant evidence is often not required. The current approach saves resources – for both cooperating parties and the Bureau / PPSC – by calling upon individuals for specific cooperation only when and to the extent required for the investigation / prosecution of other parties.

A further practical difficulty with this proposed policy change is that there will be many grey areas where an employee may have relevant evidence but it may be unclear whether he or she personally has committed an offence. There will be a reluctance to be forced into an admission where the individual's position is uncertain, particularly when an investigation is still ongoing. This policy change would have particularly significant disincentives for international corporate immunity applicants and their personnel. It will be highly disruptive for a company's global investigation and cooperation activities. Having the Canadian authorities seeking to force admissions in exchange for individual immunity grants for individuals who have potentially serious exposures in the United States and/or other jurisdictions will generate uncertainty and may result in the company as well as the affected

[14] Consultation Draft, *supra* note 2 at paras 33-35 and 76-78.

individuals being worse off in those jurisdictions. As a result, the proposed approach will likely make it difficult for the Canadian authorities to obtain cooperation from such individuals and will also discourage corporate immunity applications to the Bureau.

We recommend that the Bureau retain the current simple and certain position that all employees of a corporate immunity applicant will receive protection from prosecution as long as they provide cooperation as and when relevant. If individuals are not cooperating when called upon, they can be denied immunity at that time.

(c) **Frequent and Early Use of Recorded Interviews**

The Consultation Draft suggests that recorded "KGB" interviews will become a frequent requirement and will potentially be conducted at relatively early stages of the investigation / prosecution process.[15] This change is also neither necessary nor desirable for effective cartel enforcement – particularly in respect of international cases, where it has a significant risk of contravening the No Worse Off principle for both the corporate immunity applicant and the cooperating witness.

Canadian courts generally expect witnesses to testify in person and to be subject to cross-examination by counsel for an accused person. Recording of interviews cannot and should not be used as a general substitute for live witness testimony.

It appears that the motivation for recording interviews may stem from a case in which a witness at trial recanted evidence given to the authorities in a prior interview. But a recanting witness is a risk inherent in all prosecutions, and a recorded interview does not prevent that from occurring. Perjury or obstruction of justice proceedings can be pursued, where appropriate, regardless of whether a prior interview has been recorded.

The main disadvantage of frequent and earlier use of recorded interviews is that it may create a record in which the interview questions and responses are not fully informed by documents and other evidence that may emerge as an investigation evolves. This record may then be used to impugn subsequent testimony of the witness that would have benefitted from both the interviewer and the witness having fuller access to relevant documents that improve the individual's recollection. Thus frequent and early recording of witness interviews may actually undermine rather than enhance the ability of the Bureau and PPSC to complete prosecutions successfully.

While the Bureau / PPSC may be prepared to take that risk, in international cases counsel for cooperating parties and the enforcement authorities in other jurisdictions are likely to be concerned about the Bureau / PPSC forcing recorded interviews of cooperating individuals before investigations have matured. Thus the practical result of this policy change would be to create uncertainty and risks of being made worse off that may discourage non-Canadians from agreeing to be interviewed and may also discourage foreign companies from initiating

[15] Consultation Draft, *supra* note 2 at paras 62, 87 and 90.

immunity applications in Canada. It may also undermine effective cooperation with foreign enforcement authorities.

We recommend that the Bureau revise the Immunity Program to clarify that recorded interviews will only be used in situations where there are specific investigative or prosecutorial reasons that warrant this additional step, and that it will take into account the impact of such requests on international investigations when deciding whether and when such requests will be made.

(d) **Review of Privileged Internal Investigation Materials**

The Consultation Draft proposes to require cooperating parties to produce a list of all records withheld on the basis of privilege, and to establish a non-judicial process by which such privilege claims can be assessed as part of the immunity application process.[16] However, it does not distinguish or exempt privilege claims that relate to the applicant's own privileged internal investigation. This proposal is in direct conflict with the No Worse Off principle.

A requirement to list privileged internal investigation materials would be contrary to the vigorous protection that Canadian courts have consistently provided for solicitor-client privilege. It would be inconsistent with the approach taken in other areas of criminal law enforcement in Canada. Moreover, in any case where the investigation involves extensive records and witness interviews, it will be extremely time-consuming and wasteful (for the Bureau and PPSC, which have scarce enforcement resources, as well as for the cooperating party). The cooperating party would be made significantly worse off by this step in an immunity application process, which would increase the risk of parallel disclosure requests in civil proceedings. It is particularly unlikely that parties conducting a large internal investigation with potential legal exposure in numerous jurisdictions would be prepared to list all their privileged investigation records and disclose them to an adjudicator in Canada for review.

The Consultation Draft provides no rationale for this new requirement, and there is absolutely no need for this step to be undertaken in order to investigate and prosecute cartels in Canada. Immunity applicants have an obligation to produce all relevant non-privileged materials, under threat of the loss of the grant of immunity, and the PPSC cannot make use of any materials which are privileged in a prosecution. The independent adjudication process would be a time-consuming and wasteful use of Canada's scarce enforcement resources.

Any request by counsel for an accused for access to a cooperating party's internal investigation materials would ultimately have to be dealt with by the judge supervising the criminal proceedings. There is no need to have a two-step process where the accused is not part of the first step (PPSC and immunity applicant) before an ad hoc adjudicator whose

[16] Consultation Draft, *supra* note 2 at paras 32(c), 96, and at Appendix 4.

decisions would not be binding in a criminal proceeding. The whole process would need to be repeated again before the trial judge in the presence of the accused's counsel.

We recommend that the Bureau revise the Immunity Program to clarify that the privilege log and adjudication requirements only apply to records that are contemporaneous with the conduct and that privileged internal investigation materials are exempt from the log requirement. In addition, the review process should be deferred until an accused initiates such a request and it can be adjudicated by a judge.

Concluding Observations

The four unnecessary changes discussed above will create strong disincentives for Canadian companies to self-report possible cartel conduct to the Bureau. The incompatibility of these policy changes with international investigative and leniency processes is even more substantial and will create very powerful disincentives for international companies to participate as cooperating parties in Canada, even when they are doing so in other international jurisdictions.

The Bureau and PPSC resources that will be freed up as new applications decline could potentially be redeployed to other government priorities. However, it would be contrary to Canada's economic interest to reverse the Government's longstanding and successful commitment to protecting Canadian businesses and consumers from domestic and international cartel activity – and to forego the significant penalties that are imposed and the deterrent effects arising from effective immunity and leniency enforcement programs.