THE CANADIAN CHAMBER OF COMMERCE

LA CHAMBRE DE COMMERCE DU CANADA

Submission to the Competition Bureau

Re: Immunity Program Review

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The Voice of Canadian Business ™

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SUBMISSION CONCERNING THE COMPETITON BUREAU'S CONSULTATION PAPER ON THE IMMUNITY PROGRAM

A. Introduction

On behalf of the Canadian Chamber of Commerce (the "Canadian Chamber"), we are pleased to provide our comments on the Competition Bureau's (the "Bureau") immunity program review consultation paper of February 7th in response to the invitation for commentary. The Canadian Chamber is Canada's largest and most representative business association, speaking for 170,000 members in over 350 local chambers. The Canadian Chamber's mission is to foster a strong, competitive and profitable economic environment that benefits both businesses and all Canadians.

The Canadian Chamber notes that the Bureau hopes to elicit responses from a broad range of stakeholders to assist it in determining how its immunity program can be improved to ensure optimal effectiveness.

The Canadian Chamber appreciates the opportunity to present its views on the immunity program and would agree with the Bureau's observation that it is one of the most powerful tools for detecting, investigating and prosecuting cartels. Cartels represent significant harm for both businesses and all Canadians, removing the competitive conditions that foster a dynamic marketplace and serve the public good. We applaud the Bureau for inviting public comment on its immunity program with a view of ensuring that the immunity program achieves its stated purpose.

The Canadian Chamber acknowledges that the Bureau has issued substantial guidance to immunity applicants through providing Responses to Frequently Asked Questions issued in October, 2005 ("FAQ's"). The Canadian Chamber also acknowledges that the Bureau operates in an international law enforcement context, and that alignment of its enforcement policies with those of other national agencies will assist in both discovery and prosecution of international cartels. The willingness of the Bureau to provide additional guidance to the public on its immunity program and underlying policies provides additional transparency and will assist in enforcement objectives.

In this commentary, the Canadian Chamber hopes to provide constructive and positive feedback on the questions posed by the Bureau and hopes that any critical comments will be taken in the spirit of constructive criticism in the overall objective of combating illegal anti-competitive activity.

B. General Comments on the Questions for Commentary

In this section, the Canadian Chamber notes that certain subjects have not formed part of the consultation process and believes that consideration of the immunity policy would be enhanced by inviting comments from stakeholders on those subjects. Among the foremost of these are items drawn from the FAQ's. These include an indication that applicants are "usually" required

to provide a detailed proffer of information (including evidence of 'undue' lessening of competition pursuant to section 45 of the *Competition Act*[1]) within 30 days after having obtained a marker from a senior Bureau official. Further, the FAQ's note that a marker could be withdrawn on the basis that insufficient evidence of an offence has been provided. While the Canadian Chamber understands that there must be a certain rigour to the immunity application process, it believes that requiring a 30-day deadline will often prove incompatible with national or global business operations, given the type of detailed enquiries that must be made in advance of any application for immunity. As well, the prospect that a marker may be withdrawn simply through failure by a good faith applicant to sufficiently document an offence seems unduly punitive and could represent a substantial disincentive to potential applicants.

This may be particularly problematic for smaller-scale businesses that may not have sufficient "visibility" of an overall cartel or other scheme in order to supply sufficient detail as to "undue" lessening of competition in order to satisfy the requirements for the maker.

The Canadian Chamber believes that it would have been helpful for the Bureau to engage in advance public consultations on these points, so as to get an appreciation of the exhaustive and time-consuming nature of enquiries that must be made in order to satisfy the requirements of a detailed proffer within a 30-day time period. This is particularly onerous in light of the fact that any immunity applicant must be scrupulously careful not to misstate facts during the application (with the consequence that a marker could be revoked and potential charges of obstruction laid). The Canadian Chamber believes that these issues will continue to represent a potential disincentive to, and lack of clarity for, applicants and believes that issues surrounding the 30-day limit should have been the subject of public consultations.

If no further consultations should be in order, the Canadian Chamber believes that a more fulsome statement of circumstances under which the Bureau would entertain extensions of the 30-day period would provide more clarity and transparency to the policy announced in the FAQs.

C. The Issues for Consultation

1. Confidentiality

The Canadian Chamber appreciates the Bureau's efforts to preserve confidentiality of immunity applicants, recognizing the delicate balance required to be kept between those confidentiality interests and constitutional rights of accused to know their "case to meet". However, the Canadian Chamber observes that the Bureau's determinations of when an applicant may properly fall under confidential informant confidentiality rules are circumscribed by the law relating to confidential informants. It would also note that it is more likely that individuals coming forward will have been actual participants and witnesses to illegal cartel conduct, as opposed to confidential informants and potentially subject to identification under the doctrine of "innocence at stake" in criminal prosecutions.

Questions for Consultation

[1] Section 45(1)(c) of the *Competition Act*, R.S. 1985, c. C-24 provides that the agreement prevent or lessen competition "unduly".

1.1 How should the Bureau best balance the interest of immunity applicants that their identities and information remain confidential, with court decisions that information in pre-charge court documents, such as ITOs, be public?

1.2 Are there concerns with immunity applicants being named in court documents if they are not identified as immunity applicants, but rather as participants to the conspiracy?

1.3 Are there concerns regarding confidentiality and information sharing among competition authorities? Are there specific concerns with any particular agencies? Please provide detail.

Responses to Questions

1.1 The Canadian Chamber believes that the Bureau is bound by the established case law relating to confidential informants which balances the need for confidentiality against the right of accused parties to know the case they are to meet[2]. Any Bureau policy must reflect this jurisprudence.

1.2 Bearing in mind the need for confidentiality regarding the identity of applicants, the Bureau should strive to avoid naming applicants in any court documents unless required to do so by law. In the text of information to obtain search warrants for example, it may be possible to provide a sufficient level of detail from information provided by an applicant without necessarily identifying the applicant by name in the document. However, the Bureau must be scrupulously attentive to the law and must never mislead a court, and where the law requires disclosure of the identity of an immunity applicant, the Bureau must take steps to comply.

1.3 The Canadian Chamber recognizes that the Bureau operates in an international enforcement context and that optimum detection and prosecution of international cartels will be best achieved through strong international co-ordination. However, the Canadian Chamber believes that an applicant must always be asked for its informed consent as to whether information it provides to the Bureau may be shared with other agencies in order to enable it to undertake a proper assessment of the risks inherent in the sharing process. Apart from this, the Canadian Chamber is not in a position to provide commentary on the performance of any particular agency in this regard.

2. Oral Applications – The Paperless Process

The Canadian Chamber strongly endorses a "paperless process" for immunity applications and appreciates that the fact the Bureau will not require that new documents or work product be created for the immunity application. In this regard, the Canadian Chamber is mindful of the extensive scope of production and discovery laws in other jurisdictions (notably the U.S.) and believes for these reasons that, as a default position, the Bureau should generally not communicate in writing with an immunity applicant, save for the Provisional Grant of Immunity ("PGI"), final immunity letter, and use immunity letters for witnesses. It is noted that the Bureau

[2] See, in this regard, the comments of Cory J. in *R. v. Scott* [1990] 3 S.C.R. 979 at ¶ 34-40 and *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 *per* McLachlin, J. (as she then was) at ¶ 10 (S.C.C.)

will "typically" notify an applicant that a marker may be revoked or that it is at risk of breaching the provisional guarantee of immunity. However, the Canadian Chamber would suggest that, in cases of simple termination of markers, or where the applicant, after obtaining a marker, declines (for reasons of its own) to proceed with a proffer of detailed information, there is no need for any written communication. If the Bureau should feel it necessary to communicate in writing, the Canadian Chamber would suggest that any draft of correspondence be reviewed with the immunity applicant, who is undoubtedly in the best position to assess the potential damage that may arise from any prejudicial wording that may be contained in a letter.

Questions for Consultation

2.1 Does the Bureau's paperless process, as it is described above, address the concerns of immunity applicants facing potential civil liability in other jurisdictions?

2.2 Are certain communications less problematic than others if reduced to writing (e.g. letter from the Bureau confirming a marker; letter from an applicant providing a waiver of confidentiality; letters relating to the failure of an applicant to meet Program requirements; notice in respect of revocation of a marker)? If yes, please identify.

2.3 Are there best practices you would endorse for a paperless process that would address applicants' disclosure concerns and the Bureau's interest in avoiding misunderstandings in the communications that take place? If yes, please identify.

2.4 Are your disclosure concerns differentiated as between domestic and international case enforcement?

2.5 What fora do you see as the most effective for developing best practices for the paperless process? ICN? OECD? Other?

Responses to Questions

2.1 The Canadian Chamber generally agrees that the paperless process described by the Bureau addresses concerns of immunity applicants who may be facing exposure to civil liability in other jurisdictions. However, it has concerns regarding potential correspondence by the Bureau (see below).

2.2 If the Bureau wishes to communicate with an immunity applicant, it is suggested that a series of "form letters" be developed that would have a neutral tone in order not to contain potentially prejudicial content and that such letters should be used as the default position in any communications with immunity applicants. As expressed above, the Canadian Chamber believes that the Bureau should consider reviewing the draft of any non-form correspondence with immunity applicants in order for them to make a proper assessment of the risk exposure that may arise from the wording of any proposed letter; this will also provide the necessary degree of transparency and fairness that would encourage parties to come forward with immunity applications.

2.3 The Canadian Chamber would endorse a practice of joint review by all counsel of interview notes taken by Bureau investigators and its counsel so as to avoid any unnecessary creation of work product by applicants that may potentially prejudice them

in other fora and also to avoid misunderstandings that may sometimes arise from inaccurate recording of information.

2.4 The Canadian Chamber believes that the same principles should be applied in both domestic and international enforcement communications.

2.5 The Canadian Chamber believes that the Bureau should first work with domestic agencies and counsel to develop "best practices" that properly reflect Canadian law and practice in this area; international concerns could be addressed through the ICN and also through bilateral consultations with the U.S. Antitrust Division.

3. Role in the Offence

The current Bureau policy in this area precludes immunity for either the "instigator or the leader" of illegal activity or for the "sole beneficiary" of the activity in Canada. The FAQ's indicate that co-leaders would not be barred from seeking immunity.

The Canadian Chamber notes that the instigator requirement is not found in the policies of the European Commission or the U.K. Office of Fair Trading. Those agencies bar leniency on the basis of coercion and the Canadian Chamber believes that given the inherent difficulty in determining which entity was indeed "an instigator" of a cartel[3], it would be desirable for the Bureau to consider adopting the positions of other national agencies and stipulate that coercion should constitute the sole exclusionary test for potential immunity applicants.

As to the question of sole beneficiary, the Canadian Chamber believes that this disqualifying condition should be removed, as it is both inconsistent with the requirements of other jurisdictions and eliminating it would not, in the Canadian Chamber's view, present difficulties in international cases because non-Canadian organizations have most frequently opted to attorn to Canada's jurisdiction in order to resolve their Canadian liability. Thus, the Bureau is not likely to be left in the situation of having 'no one to prosecute' for a particular international cartel.

Questions for Consultation

3.1 Should leaders / instigators of an offence be denied immunity?

3.2 Should specific criteria be used to determine if a corporation is "the" leader or "the" instigator of a cartel and if so, what should those criteria be?

3.3 How important is the element of "coercion" as a criteria for denying eligibility to the Program? Should it be the only criteria?

3.4 How should the Bureau balance the benefit to enforcement of valuable information and evidence against the interest of pursuing charges against the driving participants of the

[3] The FAQ's note in this regard that "…the Bureau and Attorney General will review and assess all facts obtained at the time the immunity is requested by the party and during the course of the investigation"; with respect, this observation does not provide much, if any, guidance for potential applicants on this point

offence? Are there circumstances under which a cartel participant, who is the sole beneficiary of the activity in Canada, should be eligible for immunity? Please comment.

3.5 Should the Bureau specify the criteria used to determine if an applicant is the sole beneficiary of the activity in Canada? What should those criteria be?

Answers to Questions

3.1 The Canadian Chamber believes that the "leader or instigator" test should be replaced by a disqualification through coercion test.

3.2 The Canadian Chamber believes that these criteria should be removed in favour of a coercion disqualification and that the Bureau should provide some guidance on what constitutes coercion[4].

3.3 The Canadian Chamber believes that eliminating the two preconditions of the current policy in this area will not have a negative impact on the obtaining of valuable information and evidence. These preconditions presently act as potential disincentives for applicants and the Canadian Chamber believes that the Bureau would ultimately benefit from having additional applicants (who have neither coerced others nor engaged in associated criminal activities) come forward to provide valuable evidence, without which the Bureau would be unable to take any enforcement action. It also should be noted that even in the event of obtaining immunity, parties are likely to be subject to civil proceedings in both Canada and other jurisdictions and that such proceedings have a recognized deterrent effect on potential collusive conduct. The benefits of obtaining otherwise undiscoverable information from such parties would enable the pursuit of others against whom no case could be successfully mounted. As stated above, experience to date would indicate that others do come forward.

3.4 As noted above, the Canadian Chamber believes that this disqualification should be removed from the current program.

3.5 Please see comments above.

4. Coverage of Directors, Officers and Employees

The current Bureau policy indicates that all present directors, officers and employees having involvement in the anti-competitive activity and who co-operate in the inquiry will qualify under the corporate grant of immunity. However, the policy indicates that the Bureau will determine, on a "case-by-case" basis, the eligibility of past directors, officers and employees for immunity. The Canadian Chamber believes that this aspect of the policy creates unnecessary uncertainty and is not in accordance with that of other agencies such as the Australian Competition Commission, the U.K. Office of Fair Trading and the Irish Competition Authority. In this regard, the Canadian Chamber believes that, on principle, immunity should be available for all directors, officers and employees, whether past or present, provided that they provide complete

[4] In this regard, note that the U.K. OFT has set out reasonably detailed tests for determining coercion: *Leniency and No-Action, OFT's Interim Note on the Handling of Applications*, July 2005 at pp. 12-13.

and timely co-operation in accordance with other aspects of the Bureau's policy. The Canadian Chamber is unable to determine any principled reason why immunity should not be available to these individuals.

The Canadian Chamber recognizes that there may be exceptional cases where individuals have acted in fraud of their own organizations or have engaged in other discrete criminal activity (such as obstruction of justice), and that in these cases, the Bureau should have an opportunity to remove that person from the corporate grant of immunity and bring separate charges. However, the Canadian Chamber believes that directors, officers and employees should, on principle, remain sheltered under the corporate grant of immunity unless they fail to co-operate with reasonable requests made by the company under its stipulated terms of co-operation with the Bureau.

In this regard, the Canadian Chamber would also draw to the attention of the Bureau that no clarification has been given as to the extent of measures that will be required of companies to encourage co-operation of directors, officers and employees.[5] Given that businesses may be subject to differential and conflicting employment and related laws from jurisdiction to jurisdiction, the Canadian Chamber would recommend that companies be required to take only lawful measures in attempting to secure co-operation of these persons under a grant of immunity. It also should be noted that securing co-operation of individuals is often an expensive and time consuming process for businesses and that some certainty and predictability needs to be built into immunity co-operation clauses so that businesses will know "upfront" what their obligations and associated costs are in obtaining the to co-operation of individuals.

Questions for Consultation

4.1 Should standard criteria be developed to determine when past directors, officers and employees will be eligible for immunity under the umbrella of their former employer's immunity? What factors should the Bureau consider in developing criteria?

4.2 Should a company's obligation under the Program to promote the continuing co-operation of past directors, officers and employees who are covered by its immunity parallel those applicable to current directors, officers and employees? If not, how should they differ?

4.3 Are carve-outs appropriate and, if so, when?

4.4 Does this approach detract from the predictability of the Program?

4.5 What criteria should be considered when deciding whether to "carve out" an individual?

4.6 How should the Bureau address matters of apparent conflict of interest in respect of applicants?

[5] The consultation paper (under part 7, Revocation of Immunity) simply states that "…The Bureau will not be prevented from recommending immunity if the corporation is unable to secure the co-operation of one or more individuals or that co-operation is not within the firm's control. However, the number and significance of the individuals who fail to co-operate and the steps taken by the company to secure their co-operation are relevant in the Bureau's determination as to whether the corporation's co-operation is 'full, frank and truthful' "

4.7 Are there circumstances where corporate counsel should be permitted to attend interviews of individuals who they do not represent and who are not covered under the umbrella of corporate immunity?

Responses to Questions

4.1 As noted above, the Canadian Chamber believes that there should be no distinction between current and former directors, officers and employees sheltering under a corporate immunity grant and that it is only in circumstances where the individual fails to co-operate that those persons should be considered ineligible.

4.2 The Canadian Chamber believes that the Bureau should require businesses to do no more than exert lawful measures to promote the co-operation of individuals and, in accordance with the above remarks, that no distinction should be made between current and former individuals. The Canadian Chamber would also point out that companies' ability to encourage co-operation of former individuals may be more difficult and that there may be a need for flexibility and reasonableness in this determination. Conditions and terms of co-operation should be spelled out in immunity agreements.

4.3 The Canadian Chamber believes that, subject to exceptional circumstances where individuals act in fraud of their own companies or commit other criminal acts, the only basis for carving out individuals from immunity grants should be a failure to co-operate.

4.4 The Canadian Chamber believes that restricting carve-out situations to the stipulated criteria would provide a high degree of predictability and transparency in the immunity program.

4.5 Please see remarks above concerning carve-outs.

4.6 The Canadian Chamber believes that, in most immunity circumstances, the interests of individual employees, directors and officers and those of the company will be aligned so that there will be no prospect of conflict in the course of the immunity process. Where individuals fail to co-operate, they will be presumably removed from the grant of corporate immunity and have separate counsel as their individual and the company's interests may not be aligned. The Canadian Chamber believes that experienced counsel advising businesses in this area will respect and abide by their professional obligations and will duly appreciate and even anticipate those circumstances where a conflict of interest may be real or apparent and thus recommend the obtaining of separate counsel for individuals. Depending on the individual employment or contractual arrangements with the company, businesses may be obliged to pay legal expenses of individuals and this should not be a concern of the Bureau in the immunity process. However, as observed above, the Bureau must appreciate that obtaining co-operation from individuals will often be a labour and resource-intensive process for businesses and that obligations in this regard should be clearly stipulated "upfront" in the PGI and immunity agreement with the Bureau.

4.7 The Canadian Chamber believes that, provided that the individual consents, there should be no objection to having corporate counsel present during the interview of an individual.

Moreover, the company may well be in a position to provide substantial assistance to the witness through providing documents and other memory aids which will enhance the Bureau's ability to obtain correct factual information from the witness and advance its inquiry.

5. Penalty Plus

The Canadian Chamber recognizes that applicants for immunity must be truthful with the Bureau when coming forward and that an effective immunity policy will contain not only incentives for candid and truthful co-operation, but penalties for deception by potential applicants in appropriate circumstances. However, the Canadian Chamber observes that, under the Bureau's current policy, an immunity applicant who fails to make disclosure of additional potential offences will suffer not only an additional punitive sentence on the later discovered "newly disclosed" product but also have the prospect of having its immunity revoked on the initial product. The Canadian Chamber notes that this policy is not in accordance with that of the United States Antitrust Division and seems unduly harsh and punitive, since the Bureau and Attorney General of Canada (the "Attorney General") already have the ability to extract a severe penalty on sentencing for the second product by stressing the aggravating factor of the applicant's having made no disclosure of that product when specifically asked by Bureau counsel. However, it should also be noted that, to the Canadian Chamber's knowledge, the practice of Bureau and Attorney General counsel using an "omnibus question" as part of the interview process has not been made uniform. In order to drive home the necessary point that proper disclosure must be made, the Canadian Chamber would recommend that the Bureau and Attorney General have a clear and consistent policy of asking a stipulated question during the interview process and to publicize this practice, so as to put organizations and individuals on notice that they will be required to make reasonable enquiries in order to answer that enquiry.

The Canadian Chamber would also note that the policies of the Attorney General and Bureau are not co-ordinated on the nature of offences required to be disclosed in response to the 'omnibus question'. Under the Attorney General policy, applicants are potentially required to disclose world-wide criminal activity[6], while under the Bureau policy, applicants are required only to make known other potential *Competition Act* offences. These disparate policies introduce uncertainty into the process and require alignment in order to make a properly predictable and transparent policy for immunity applicants.

Questions for Consultation

5.1 Should the Bureau adopt a" Penalty Plus" program, similar to that used by the U.S. DOJ?

5.2 How much of an increase in penalty (either pecuniary, or custodial in the case of individuals) would be appropriate, and on what basis?

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[6] see Department of Justice, *Federal Prosecution Deskbook*, "Immunity Agreements" at 35.5 "The Decision to Offer Immunity", available at http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch35.html#35_5_7

Responses to Questions

5.1 The Canadian Chamber recognizes that a "penalty plus" program can be an effective component of an immunity process, but only if procedures are clearly set out for potential immunity applicants, as discussed above. The Canadian Chamber does not believe that it is necessary to have the additional punitive measure of revoking the immunity of an applicant on the initial product, when the same or similar results can be obtained through a more punitive penalty imposed on sentencing upon the "later discovered" product.

5.2 The Canadian Chamber would note that, at present, the Bureau and Attorney General do not have any published policies on fine levels that should be expected of non-immunized parties who may be considering the resolution of their criminal liability. While the Canadian Chamber would be opposed to the adoption of formal "sentencing guidelines" akin to those in use in the United States, the Bureau should make it clear that after the immunity applicant, the next party that seeks in good faith to resolve its criminal liability will be subject to a much lesser scale of penalties than that will be afforded to later arrivals (as discussed under the "formal leniency" Part 8, *infra*). However, the Canadian Chamber recognizes that judicial discretion will always apply to the imposition of punishment, such that any published guidelines in this area must ultimately be accepted by the courts and that aggravating and mitigating circumstances will always apply in the sentencing process.

6. Restitution

The Bureau's current policy notes that restitution, as a condition of obtaining immunity, is only be made "where possible". The Canadian Chamber notes that restitution is not a feature of the Australian Competition Commission's policy nor with the European Commission or the U.K. Office of Fair Trading. However, the policy is similar in wording to that of the United States Antitrust Division.

The Canadian Chamber believes that the potential for private enforcement of competition law claims, together with available class action legislation in several provinces, provide adequate remedies for persons who consider themselves aggrieved by anti-competitive conduct.

Questions for Consultation

6.1 Is restitution an appropriate requirement for eligibility under the Program?

6.2 How can it best be ensured that victims of the offence are accurately identified and that restitution is appropriately assessed?

6.3 Should alternative arrangements be made with applicants in cases where victims are not identifiable or the amounts cannot properly be assessed? Please identify suggested alternative arrangements.

6.4 Are there situations in which restitution should be excused? If yes, please identify.

6.5 Is restitution a matter better handled between the parties themselves, either privately or through civil action?

Responses to Questions

6.1 As noted above, the Canadian Chamber would recommend that this requirement be removed from the program and that parties who sustain alleged damages as a result of anti-competitive conduct should have the option of taking civil proceedings against violators under the available civil recovery tools (and that potential defendants have available to them all defences developed in the jurisprudence). The Canadian Chamber notes that section 36 of the *Competition Act* provides a civil right of recovery for potential claimants in respect of conduct either contrary to any provision of Part VI or through a failure of a party to comply with a court or tribunal order under the Act.

6.2 As noted above, the Canadian Chamber does not believe that restitution should continue even as a conditional requirement for obtaining immunity. Moreover, the Canadian Chamber notes that an institutionalized Bureau process of identifying "victims" would entail large resource requirements which would be better dedicated to investigation and enforcement activities.

6.3 As noted above, the Canadian Chamber believes that restitution should no longer be a requirement of the program.

6.4 Please see commentary above.

6.5 The Canadian Chamber believes that existing mechanisms for civil recovery of damages, either independently or pursuant to section 36 of the Act coupled with class action proceedings, constitute sufficient means to enable recovery.

7. **Revocation of Immunity**

The Canadian Chamber agrees with the Bureau's assessment that revocation of immunity is a very serious step and in light of its potential consequences for applicants, should therefore only be considered in egregious circumstances. Of concern to the Canadian Chamber is the observation in the consultation paper that revocation may be considered when a company "does not fully promote the complete and timely co-operation of its employees". As noted in the discussion under section 4 above, companies may be subject to differential employment and related laws from jurisdiction to jurisdiction and this, coupled with the lack of clarity on what should be required of businesses in order to promote co-operation, has introduced an element of uncertainty and a potential disincentive for corporate applicants. As noted above, the Canadian Chamber believes that the Bureau should be sensitive to the fact that attaining co-operation of persons in former employ may present substantial obstacles and that a measure of flexibility and realism should be injected into policies requiring businesses to promote co-operation.

To the knowledge of the Canadian Chamber, there has not been any revocation of antitrust immunity in Canada, neither has there been an occasion where the Bureau has recommended to the Attorney General that such action take place. This is welcome, as it would indicate that applicants are generally discharging their obligations in a satisfactory fashion. However, in the rare circumstances where the fulfillment of immunity obligations may be questioned, the

Canadian Chamber believes that the Bureau should adopt a fault-based approach for determining whether immunity should be revoked. Where the Bureau questions the adequacy of measures employed by a corporation to encourage co-operation of their employees, it should not be sufficient for the Bureau to simply assert that a company did not adequately obtain the co-operation of individuals, but rather that it condoned or actively worked to discourage or prevent co-operation of its employees, or in some other fashion frustrated the ends of justice in the immunity process.

Questions for Consultation

7.1 What factors should the Bureau take into account in assessing whether a breach of an immunity agreement is sufficient to warrant revocation?

7.2 Are there limits to a company's ability to secure the co-operation of its directors, officers and employees that should be recognized by the Bureau?

7.3 How should the Bureau treat individuals covered by an immunity agreement between the Attorney General and their company where their company's agreement is revoked?

7.4 What procedural steps should the Bureau follow before making a recommendation for the revocation of immunity?

7.5 Are there any other concerns the Bureau should be aware of in respect of its investigation or prosecution of applicants whose immunity has been revoked?

Responses to Questions

7.1 The Canadian Chamber believes that the Bureau should adopt a fault-based test for determining whether immunity will be revoked. In this regard, guidance may be taken from the Federal Prosecution Deskbook[7] which sets out several explicit criteria to be used by the Attorney General in determining whether immunity agreements have been breached. The Canadian Chamber believes that importing similar criteria into the Bureau's determination of revocation would provide the necessary predictability and transparency for applicants in this area.

7.2 As noted above, the Canadian Chamber believes that there are indeed limitations to companies' ability to secure co-operation of both current and particularly, former employees and that this should lead to some flexibility in policies in this area. In cases where there may be disputes between a company and the Bureau as to measures appropriate to secure co-operation, the Canadian Chamber believes that the Bureau should explore the potential for use of an alternative dispute mechanism in order to seek to resolve those disputes before potentially proceeding to indict and prosecute an applicant, particularly one who has made good faith efforts to secure co-operation but has been rebuffed. As noted above, the Canadian Chamber recommends a fault-based approach to revocation issues.

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7 *ibid.* at 35.8 "Breach of Agreements"

7.3 The Canadian Chamber believes that individuals should continue to be immunized notwithstanding the loss of corporate immunity unless it can be determined that their individual fault mandates removal of the shield of immunity.

7.4 The Canadian Chamber believes that, given the seriousness of the consequences of revocation, the Bureau should take all reasonable steps to first resolve any disputes that underly potential revocation (such as first employing an ADR process as referred to above in respect of resolving disputes about encouraging co-operation) and then provide formal advance notice to an applicant with particulars of alleged failures by the applicant for immunity. The applicant ought to be given reasonable opportunities to rectify any deficiencies in the process. The Canadian Chamber believes that the Bureau's policy should set this out clearly in order to provide the necessary predictability for applicants and also to avoid any disincentive that may arise from a less-than-rigorous approach to the issue of revocation.

7.5 The Canadian Chamber believes that in some circumstances, it would be manifestly unfair to prosecute a party whose immunity may be revoked where that party has not engaged in appropriate fault-based conduct as described above. Experience from related criminal law jurisprudence suggests that it is only in cases of deliberate deception or misleading conduct that prosecutors have sought to remove the shield of immunity[8] and the Canadian Chamber believes that such a similar rigorous standard should apply to revocation by the Bureau. However, even where revocation may be justified in policy terms, the Attorney General's ability to utilize derivative evidence obtained from an applicant during the immunity process remains seriously in doubt; recent Supreme Court jurisprudence would suggest that a trial judge would have a broad discretion to exclude evidence obtained through co-operation of the very party sought to be prosecuted upon the basis that it would result in a fundamentally unfair trial[9]. There is a clear prospect for bringing "abuse of process" applications in such cases and the resultant chilling of incentives for potential applicants.

8. Creation of a Formal Leniency Program

The Canadian Chamber would point out that applicants may fail to pursue the benefits of immunity through ignorance of the process or delay factors associated with a thoroughgoing internal investigation. Further, in international cartel matters, approaches to regulatory agencies may be affected by circumstances beyond the individual entity's control and may relate to a need to properly co-ordinate approaches to a number of national agencies.

The Canadian Chamber believes that, for 'second-ins' and later arrivals to the process, one of the basic problems in this area is the absence of a quantifiable scale of penalties for the conspiracy offence, and particularly in the context of international cartels. Unlike the U.S., where overt sentencing guidelines provide a degree of transparency and predictability (by limiting judicial discretion), Canada has no such system and, at best, only an informal percentage-based approach

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8 See, e.g., *R. v. MacDonald* [1990] O.J. No. 142 (Ont. C.A.).

9 *R. v. White* [1999] 2 S.C.R. 417 and *R. v. Buhay* [2003] 1 S.C.R. 631.

to proposed fines in cartel cases.[10] These percentages are often, in turn, based upon the volume of Canadian commerce in the impacted product(s). However, the Canadian Chamber recognizes that sentencing determinations are not subject to scientific precision and that therefore a quantifying approach would represent real challenges in implementation. As well, judicial discretion in the sentencing process, together with the need to consider individual aggravating and mitigating circumstances make implementing formal guidelines very challenging.

A thoroughgoing immunity policy must also take account of the fact that non-immunized parties must also be provided incentives to approach regulatory agencies in order to resolve their outstanding criminal liabilities.

To this end, the Canadian Chamber believes that Bureau should make it clear that the next party following an immunity applicant who applies, in good faith, to resolve its criminal liability, that has not engaged in coercion or other associated criminal conduct, and offers full co-operation should be given a substantial discount from the usual ranges of penalties applied in cartel conspiracy cases. Such a policy would not only enhance the operation of the program but also add a higher degree of transparency and predictability for entities which are unable to make a timely application for immunity or for other reasons may be legitimately unable to qualify for immunity.

The Canadian Chamber also believes that any leniency policy must also take into account other circumstances of the Bureau's current immunity policy, such as the Bureau's marker practice. As an example of the latter, the Canadian Chamber would point to the possibility of a marker applicant's losing its position arising from its inability to demonstrate to the Bureau's satisfaction that an offence under section 45 of the *Act* (with its requirement to demonstrate adverse market effects) has occurred. It seems completely unfair for the Bureau to obtain information from a subsequent party and then turn and prosecute the party who had lost its marker. Surely this would result in chilling of potential applicants and could result in immunity-based case generation coming to a complete halt.

Questions for Consultation

8.1 When should leniency be available and under what terms?

8.2 What criteria should be considered in determining the degree of leniency recommended by the Bureau to the Attorney General?

8.3 Under what circumstances, and based on what incentives, would a party be most likely to co-operate with the Bureau in return for leniency?

8.4 How should different levels of incentives for co-operating parties be approached?

Responses to Questions

[10] Senior Bureau officials have sometimes publicly referred to an internal document setting out certain criteria and percentage of volume of commerce sentencing ranges for applicants at various stages of the immunity and leniency process: "The s. 45 Tariff According to Low"; however, the Canadian Chamber notes that this document has yet to assume any formal standing in the sentencing policies of the Bureau and Attorney General.

8.1 The Canadian Chamber believes that leniency should most definitely be available to parties who fail to qualify for immunity or otherwise to parties who approach the Bureau in good faith to resolve their criminal liability. However, the lack of a formal scale of penalties (which is itself challenging to implement, as noted above) tends to blur the incentives for second-in and later parties who are considering applying for leniency. At least, the Bureau (and Attorney General) should make it clear that the next party to approach the Bureau after the immunity applicant should be able to obtain a substantial discount from general sentencing precedents imposed by the courts for the particular offence, while allowing for the application of aggravating and mitigating circumstances in the sentencing process.

8.2 The Canadian Chamber believes that the Bureau should use a principled, fault-based approach in determining the degree of leniency to be recommended to the Attorney General. If a party comes forward in good faith and has not engaged in coercion of others or other criminal conduct, and is willing to provide complete co-operation in the Bureau's inquiry, it should be able to obtain a substantial discount, on a relative basis, to later parties in the investigation and prosecution process. This principle should continue to be applied, on a descending scale, to subsequent parties who come forward.

8.3 The Canadian Chamber believes that parties are most likely to come forward and co-operate with the Bureau where there are high levels of transparency and predictability in the conditions offered for both immunity and leniency, as well as a degree of predictability on the levels of penalties ordinarily recommended by the Bureau and sought by the Attorney General on sentencing. While there may well be other considerations motivating a party's decision to approach or refrain from co-operating, providing substantial incentives for leniency applicants will most likely generate the highest level of co-operation and case resolution which would advance the overall enforcement of criminal antitrust legislation.

8.4 As noted above, the Canadian Chamber believes that a fault-based principled approach should be used in implementing differentiated levels of penalties for various parties. Earlier parties should be eligible for the greatest discount from prevailing sentencing jurisprudence while those who engage in coercion or other criminal conduct should receive appropriate penalties associated with those aggravating factors. In appropriate cases, these could consist of severe sanctions, even including incarceration for individuals committing serious criminal acts of threatening or obstruction of justice. The adoption of policies of this nature would provide public notice to parties that they should actively seek to co-operate with regulators as early as possible and that associated forms of criminal conduct will attract severe penalties. This would ultimately enhance the enforcement objectives of the immunity policy.

9. **Pro-Active Immunity**

The Bureau is exploring the possible use of 'pro-active immunity' under which it would actively seek out potential immunity applicants and extend its current role of making known details of its immunity policy during the course of an investigation. The Bureau indicates that it is considering doing so out of concern that its immunity program may not be well known to all

persons and corporations who may take advantage of its opportunities and benefits so as to enhance the enforcement ends of the program.

The Canadian Chamber notes that there does not appear to be any international consensus on the merits and potential benefits of pro-active immunity, such that the Bureau could well be implementing an affirmative immunity program for international cartel investigations that could conflict with the actions of other national agencies[11] (for example, approaching a potential target of an investigation that would not be eligible for immunity in other jurisdictions). This does not mean that the Bureau must always accord with the views and actions of other regulators but that decisions to proactively offer immunity should be balanced against the damage that may occur through failure to co-ordinate international regulatory action.

Further, the Canadian Chamber has a concern that, at an early stage of an inquiry, the Bureau may not have sufficient information to enable a well founded 'choice' of a target. What if the Bureau were to choose a party for proactive immunity treatment that, when later facts are gathered, is found to have engaged in improper coercion of other parties in illegal activity?

The Canadian Chamber believes that the propagation of the Bureau's immunity program through public education by Bureau officials, as well as statements and appearances by senior Bureau officials, including the Commissioner, has already contributed to better knowledge of the immunity program by the public and that continued efforts in this regard will continue to bear fruit.

Questions for Consultation

9.1 Should the Bureau consider initiating approaches to potential immunity applicants during the course of an investigation if it has some reason to believe that a party might be eligible to apply under the Program? If your answer is 'yes", under what circumstances should such an approach be made?

9.2 Do matters of fairness arise with respect to which parties the Bureau may choose to approach or when it chooses to make the approach? How should they be addressed?

9.3 If a party requests a marker, is denied because it is not first-in and then decides not to co-operate further, should the Bureau subsequently contact that party if the first-in application fails?

Responses to Questions

9.1 The Canadian Chamber believes that the Bureau should have the ability to provide information concerning its immunity program to potential immunity applicants during the course of an investigation but more careful study of the international context and potential domestic applications of this policy should be undertaken before any program of pro-active immunity is undertaken. The Canadian Chamber would be pleased to assist in any study of this proposed measure.

[11] To the knowledge of the Canadian Chamber, the Australian Commission is the only national agency considering the use of pro-active immunity in international cases.

9.2 The Canadian Chamber believes that issues of fairness arise where the Bureau is considering which party ought to be approached under any pro-active immunity program, as outlined above. There is a distinct potential for making an inappropriate approach to the 'wrong' party which could have implications for other domestic and international participants in illegal antitrust activity, and could thereby ultimately act as a disincentive for good-faith applicants wishing to come forward, confess their misconduct, and obtain the benefits of immunity. Further, the Canadian Chamber believes that the Attorney General would have to be involved in any development of policy in this area, since it is the Attorney General that ultimately provides the grant of immunity. Based on the Attorney General's Federal Prosecution Deskbook policy on immunity, the Canadian Chamber does not see clear support for such a policy of pro-active immunity (although it is not explicitly ruled out).

9.3 The Canadian Chamber believes that cases where the first party's marker is denied or fails are fraught with difficulty. Particularly, if a party approaches the Bureau in good faith but is unable to establish the constituents of an offence because it does not have good 'visibility', the Bureau may then have sufficient information in its possession to contact another party under a pro-active immunity regime. The consequences of this could be prosecution of the initial party which would be manifestly unfair and cause irreparable damage to any immunity program (see the discussion relating to failed immunity applicants under Part 8, above). The Canadian Chamber believes that the Bureau should consider approaching subsequent parties only on a principled basis, including circumstances where the initial immunity applicant loses its marker through discovery of the applicant's coercion of others or where that party has misled investigators or fabricated facts or evidence.

All of which is respectfully submitted by

THE CANADIAN CHAMBER OF COMMERCE