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**BREAK OUT SESSION TWO: IN-HOUSE COUNSEL ISSUES**

**WHEN THE BUREAU CALLS:  
RESPONDING TO ANTITRUST INVESTIGATIONS**

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## WHEN THE BUREAU CALLS: RESPONDING TO ANTITRUST INVESTIGATIONS

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This paper provides a practical overview of the investigative powers available to the Commissioner of Competition (the “Commissioner”), examples of the ways in which they are used, and the ways in which in-house and other counsel can prepare for, and respond to, Bureau investigations.

### INTRODUCTION

The Commissioner is Canada’s chief antitrust enforcement official. He has exclusive authority to administer and enforce the *Competition Act*<sup>2</sup> and is responsible for investigating suspected violations of the Act and initiating proceedings for reviewable practices.

The Commissioner must commence a formal inquiry whenever he has reason to believe a criminal offence has been, or is about to be, committed or that grounds exist for the Tribunal to make an order regarding a reviewable practice.<sup>3</sup> Although most inquiries begin at the Commissioner’s instance, the Commissioner is required to commence an inquiry when the federal Minister of Industry so directs,<sup>4</sup> or on the sworn application of six Canadian residents.<sup>5</sup> Inquiries are conducted in private and strict rules of confidentiality apply.

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<sup>2</sup> R.S.C. 1985, c. C-34, as amended. [hereinafter *Competition Act*]

<sup>3</sup> *Ibid.* at s. 10(1)(b).

<sup>4</sup> *Ibid.* at s. 10(1)(c).

<sup>5</sup> *Ibid.* at s. 10(1)(a).

## INVESTIGATIVE POWERS

The Commissioner may make formal or informal enquiries for information/assistance from targets of investigations or other market participants. The formal investigative tools available to the Commissioner include search and seizure, examinations under oath, and production of records or other physical evidence.<sup>6</sup> Computer data bases and corporate records of both Canadian and foreign affiliates are vulnerable to compulsory process.

The manner in which an investigation is conducted depends largely upon the nature of the offence and the level of cooperation the Bureau receives (or expects to receive) from the parties (although the profile of the case also may influence the Commissioner's approach). Investigation of less-adversarial matters such as mergers and other reviewable practices typically do not involve formal investigative tools.

Informal inquiries may take the form of telephone calls, interviews and written requests for information. These requests may be directed at the target of the investigation or its suppliers, customers and competitors. For example, when the Bureau recently examined unusual increases in the retail price of gasoline, investigators contacted representatives of the petroleum industry and other informed sources for information regarding the sudden uniform price increase.<sup>7</sup> When allegations of collusion were made against Air Canada and Canadian Airlines earlier this year, the Bureau spoke with representatives of each airline and others in attendance at Canadian Airlines' annual general meeting where remarks suggesting collusion allegedly were made, and determined that the allegations were unfounded.<sup>8</sup>

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<sup>6</sup> See also Madeleine Renaud, "Dealing with a criminal investigation under the *Competition Act*: Responding to Orders and Information Requests" (Annual Competition Law Conference, 1996).

<sup>7</sup> Competition Bureau, "Competition Commissioner Launches Immediate Examination of Retail Gasoline Prices Under the *Competition Act*" (22 July 1999).

<sup>8</sup> Competition Bureau, "No Evidence of Collusion Found Between Canada's Major Airlines" (12 July 1999).

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

**TIPS FOR COUNSEL #1: RESPONDING TO AN RFI**

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

Informal requests are not regulated by the Act and a response to an informal request cannot be compelled. That said, those who refuse to co-operate with an informal request may find themselves subject to a section 11 order or other formal process compelling “co-operation.” This creates a significant incentive to co-operate with the Bureau at every stage of an investigation.

**SECTION 11 ORDERS**

Once a formal inquiry is commenced under section 10 of the Act, the Commissioner may seek to use one or more of the formal investigative powers available to him under the Act, including a order under section 11 to compel testimony or the production of documents. If a judge is satisfied that a person has, or is likely to have, information that is relevant to the inquiry, the judge may order that person to: (i) be examined under oath; (ii) produce records or other things; and/or (iii) deliver a written statement under oath. The subject of an order cannot refuse to comply on the basis that their evidence may incriminate themselves, or subject them to further examination. However, evidence given by an individual pursuant to a section 11 order cannot be used or received against that individual in any criminal proceedings thereafter instituted against him (other than a prosecution under section 132 or 136 of the *Criminal Code*).<sup>9</sup>

Persons failing to comply with a section 11 order without good and sufficient cause commit an offence punishable by a maximum fine of \$5,000 and/or imprisonment for a maximum of two years.<sup>10</sup>

### *Examination Under Oath*

The ability of the Commissioner to compel a (natural) person to be examined initially raised concerns about self-incrimination under section 7 of the Canadian Charter of Rights and Freedoms, which guarantees everyone “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>11</sup> The Supreme Court of Canada considered the issue under similar legislation in the *Branch*<sup>12</sup> case and determined that section 7 rights were not offended.

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<sup>9</sup> Competition Act, *supra* note 2 at s. 11(3).

<sup>10</sup> *Ibid.* at s. 65(2).

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

<sup>12</sup> *British Columbia Securities Commission v. Branch et al.*, [1995] 2 S.C.R. 3 [hereinafter *Branch*]

*Branch* involved a company listed on the Vancouver Stock Exchange that disclosed an auditor's report which made reference to serious deficiencies in the control, documentation and approval procedures of the company. Shortly thereafter, the Vancouver Stock Exchange halted trading in the company's shares and the British Columbia Securities Commission began an investigation under section 126(1) of the *BC Securities Act*.<sup>13</sup> In furtherance of the investigation, summonses were issued to two directors of the company to compel their attendance for examination under section 128(1) of the *Securities Act* which states "an investigator appointed under section 126 or 131 has the same power to compel witnesses to give evidence on oath or in any other manner."<sup>14</sup>

In its decision, the Supreme Court determined that if an individual is compelled to testify, the privilege against self-incrimination requires that the individual receive "use and derivative use immunity." This effectively means that the evidence given by that person cannot be used against them in a further proceeding. In addition, any evidence that is obtained as a result of that person's testimony, or the significance of which could not be appreciated but for their testimony, cannot be used to incriminate them in a subsequent proceeding.<sup>15</sup>

The court also held that in order for an individual to be exempted from the compelled testimony, they must show that the predominant purpose for seeking the testimony is to obtain incriminating evidence against them, rather than some legitimate public purpose.<sup>16</sup>

In the context of the *Competition Act*, the Commissioner can virtually always argue that testimony sought under a section 11 order is to achieve a legitimate public objective. Further, section 11 specifically provides that any evidence obtained as a

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<sup>13</sup> S.B.C. 1985, c. 83

<sup>14</sup> Section 128(1) is thus very similar to section 11(1) of the *Competition Act* which allows a judge to order an individual to give testimony under oath in furtherance of a formal inquiry initiated pursuant to section 10 of the *Competition Act*.

<sup>15</sup> *R. v. R.J.S.*, [1995] 1 S.C.R. 451.

<sup>16</sup> *Branch*, *supra* note 12 at 468.

result of a person's compelled testimony may not be used against them in a subsequent proceeding. It therefore seems highly unlikely that anyone will be exempted from a section 11 order by virtue of section 7 of the Charter.<sup>17</sup>

By way of procedure, the person under examination has the right to have their counsel present.<sup>18</sup> However, the role of counsel is limited to objecting to improper questioning and clarifying its client's statements.<sup>19</sup> In addition, others whose conduct is under inquiry may attend, as may their counsel.<sup>20</sup> However, attendance may be prohibited if the Bureau representative satisfies the examiner that the person's presence would be prejudicial to the effective conduct of the examination or result in the disclosure of confidential information.<sup>21</sup>

### *Production of Records*

Under section 11 a corporation (and individuals) may be compelled to produce documents in its possession, or the possession of any of its affiliates. An order may require that documents located in Canada or abroad be provided.

Documents which are produced (unlike oral testimony or written returns) are not subject to any immunity and may be used against the informant in current or future investigations. However, corporate officers are immune in that the documents cannot be used to incriminate them.

Anyone who destroys or alters documents covered by a section 11 order is guilty of an offence and is liable on conviction on indictment to a maximum fine of

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<sup>17</sup> Note that the compelled testimony rules apply to persons, but the exclusion of evidence in future proceedings (derivative use immunity) only applies with respect to individuals.

<sup>18</sup> *Competition Act*, *supra* note 2 at s. 12(3).

<sup>19</sup> *Irvine v. Restrictive Trade Practices Commission*, [1987] 1 S.C.R. 181, at 231-135.

<sup>20</sup> *Competition Act*, *supra* note 2 at s. 12(4).

<sup>21</sup> *Ibid.*



\$50,000 and/or a maximum imprisonment of five years.<sup>22</sup> If an officer or director participates in, authorizes or acquiesces to the destruction or alteration, that individual will be held personally liable.<sup>23</sup> It is therefore important that counsel advise their clients under investigation that they ought to ensure that all documents remain in the state that they exist at the time the order was issued.

The documents and information sought under a section 11 order usually are extensive, although no more extensive than RFIs issued in complex cases. The Bureau's current practice is to issue section 11 orders (rather than RFIs) in most cases of significance. The advantage of a section 11 order (from the Bureau's perspective) is that compliance is mandated by court order, a fact that may enhance the seriousness with which subjects of the order respond. This might result in responses which are more complete and filed sooner.

However, whether section 11 order or RFI, responding may be disruptive to clients' businesses and will require the attention of senior executives. It was reported last year that section 11 orders issued in connection with investigation of the bank managers resulted in more than 400,000 pages of paper as well as entire databases (together with their operating codes and software) being provided to the Bureau. To properly respond, senior executives of the banks, across the country, had to abandon other duties and rummage through their filing cabinets to retrieve subpoenaed documents.<sup>24</sup>

<b>TIPS FOR COUNSEL #2: RESPONDING TO SECTION 11 ORDERS</b>
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<sup>22</sup> *Ibid.* at s. 65(3).

<sup>23</sup> *Ibid.* at s. 65(4).

<sup>24</sup> Rod McQueen, "Showing Banks Who's Boss: Competition authorities are even using subpoenas to extract mountains of data on proposed bank mergers" *The Financial Post Weekly* (22 August 1998) 7.

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

## SEARCH AND SEIZURE

Traditionally, the powers of search and seizure found in sections 15 and 16 of the *Competition Act* were used by the Commissioner only in criminal matters. However on occasion the Bureau has used these powers to assist in non-criminal inquiries.<sup>25</sup> The first such use of search and seizure powers in a non-criminal investigation arose in connection with an alleged abuse of a dominant position.<sup>26</sup> Without any prior requests for information, and no warning to the targeted corporations, the Bureau exercised search warrants simultaneously in seven different locations across Canada. The Commissioner's willingness to exercise and obtain a search warrant in circumstances such as these point out the need for counsel to be aware of the search and seizure provisions of the Act and develop a strategy to respond to a search.

### *The Commissioner's Right to Search*

Under section 15 of the Act, the Commissioner can make an *ex parte* application to a court to obtain a search warrant. In his application, the Commissioner must demonstrate that there are reasonable grounds to believe that: (i) a criminal offence has been committed, is about to be committed, or grounds exist for the Competition Tribunal to make an order respecting a reviewable matter; and (ii) at the premises sought

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<sup>25</sup> John F. Clifford and J. William Rowley, "Search and Seizure: Canada Gets Tough" Spring 1996 *Antitrust* 10.

<sup>26</sup> *Ibid.*

to be searched there are records or other things that will afford evidence of the offence or matter.

Pursuant to section 65(1) of the Act, it is an offence for any person in possession or control of premises or computer systems subject to a warrant, to fail to make the premises available without good and sufficient cause.<sup>27</sup> The offence is punishable by a maximum fine of \$5,000, imprisonment for a maximum of two years, or both. As mentioned earlier, destroying or altering records is an offence punishable on indictment by a fine of no more than \$50,000, imprisonment for a maximum of five years, or both.<sup>28</sup>

The Commissioner may only search premises with a warrant, unless exigent circumstances exist. Exigent circumstances could include situations in which the delay caused by obtaining a warrant would result in the destruction or loss of evidence.<sup>29</sup> If exigent circumstances do exist, the Commissioner may search the premises without a warrant, provided that reasonable grounds otherwise exist that an offence has been (or is about to be) committed, or that grounds exist for the Competition Tribunal to make an order.

### *The Warrant*

The search warrant contains details about who can search, what they can search for and where. The warrant will name the specific individuals authorized to conduct the search, and only those named should be allowed to search. The warrant also will contain a description of the types of records that are sought. If counsel is present at the time of the search, he or she ought to be careful to observe that the records taken comply with the description of what is sought in the warrant. Finally, the warrant also will describe the area that is to be searched. Persons in control of the area to be searched must permit the

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<sup>27</sup> *Competition Act*, *supra* note 2 at s. 65(1). (Emphasis added)

<sup>28</sup> *Ibid.* at s. 65(3).

<sup>29</sup> *R. v. Grant*, [1993] 3 S.C.R. 223 at 241-242.

named individuals to enter and search the premises, as well as examine, copy and seize records or other things. If access is denied, or the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant may authorize police to assist in the search.

### *Computer Searches*

The Act provides that a person authorized to search premises for a record may use or cause to be used any computer system on the premises to search any data *contained in or available to the computer system*, wherever located, print the record and seize it.<sup>30</sup> The term “computer systems” includes portable computers, pocket and hand-held electronic diaries and personal digital assistants containing calendars, telephone lists and other information.<sup>31</sup> If a log-in name or password are required to access the computer system, the Commissioner’s position is that an individual on the premises is required to assist the persons conducting the search to gain access to the computer. The position is not supported by jurisprudence, and typically issues arise about access during the course of a search. However, the issue is becoming moot as search officials increasingly arrive at the scene with technology in hand that, with the flick of a switch, gives them access to all data available to the computer.

The Commissioner’s position is that if the information is “contained in or available to” a computer system in Canada, then it can be seized, even if the information is stored at locations outside of Canada.<sup>32</sup> However, others suggest that transnational computer searches may constitute an infringement of State sovereignty of the searched country.<sup>33</sup> On one hand, it is possible to assert that any record accessible through a

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<sup>30</sup> *Competition Act*, *supra* note 2 at s. 16(1).

<sup>31</sup> Harry Chandler, “Criminal Investigations: Process and Procedure” (Canadian Bar Association Competition Law Annual Conference, 24 September 1998).

<sup>32</sup> James D. Sutton, “Investigations under the Competition Act: Recent Issues” (Important Changes in Competition Law and Competitive Business Practices, The Canadian Institute 10 May 1996).

<sup>33</sup> *Ibid.* at 66. See also Calvin S. Goldman, Q.C. and Joel T. Kissack, “US/Canada Antitrust Co-operation and Cross-border Computer Searches” (presented at American Bar Association 1998 Annual Meeting, Toronto, Canada, 3 August 1998).

computer terminal located in the authority's jurisdiction is "located" in that jurisdiction; on the other hand, it may be asserted that only those documents which are actually stored on the computer system located in the authority's jurisdiction are legitimately accessible to such authority.<sup>34</sup> This issue has not been adjudicated and is susceptible to future litigation given the divergent views.

### *Privileged Documents*

Whether searching computer systems or hard copy files, investigators are likely to have access to privileged documents. Under the Act the Commissioner may not examine, copy or seize documents without providing a reasonable opportunity for claims of solicitor-client privilege to be made. Any person in authority at the premises may claim the privilege. Upon making the claim, the document should be placed in a sealed package and put in the custody of a judicial officer until a judge can review it.

The Commissioner cannot examine or copy any documents over which privilege has been claimed. The party alleging the privilege must make an application to the court within thirty days for a determination as to whether the document is covered by solicitor-client privilege. If such an application is not brought within thirty days, the Commissioner may bring an *ex parte* application for an order that the documents be delivered to him.

Often, privileged claims can be discussed and resolved between counsel and the head of the search team. This helps to avoid compliance with the formal claim procedures under the Act and having to appear before a judge for determination of the validity of the privilege claims. For this and other practical reasons (*e.g.*, getting copies of all seized documents before they are removed from the premises), it is desirable to establish good relationships with the search team early on (which can be accomplished without compromising a client's rights or legal protections).

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<sup>34</sup> *Ibid.* at 11.

**TIPS FOR COUNSEL #3: ANTICIPATING A SEARCH**

- Signs that the Bureau could come knocking at your (client's) door:
- There is an ongoing investigation in the industry/market, or
- A corporate official known or suspected to have engaged in anti-competitive behaviour with management level responsibility is terminated.
- If you suspect that you could become subject of an investigation, initiate a discreet internal investigation to determine the extent of the problem.
- Alert key employees about the potential for an investigation.
- Collect, copy and return all relevant documents that are necessary to carry on business.
- Consider written advice to employees indicating that they do not have to speak to officials and/or they may request to speak to corporate counsel first.
- Inform receptionists, office managers and security personnel that if the Bureau comes knocking, they should ask for ID, a copy of the warrant, advise counsel immediately, and permit enforcement officials to enter (if required).

**TIPS FOR COUNSEL #4: RESPONDING TO A SEARCH<sup>35</sup>**

- Investigators will arrive unannounced, usually at the beginning of the work day.
  - Upon the arrival of the search team, someone on the premises should:
  - Ask to see the warrant, and read it carefully to determine the alleged offence(s), the premises covered and the documents sought
  - ask each search team member to identify themselves.
  - Call legal counsel and any individuals named in the warrant whose offices are to be searched.
- Search team members will act professionally and accept the direction of knowledgeable persons.
- If asked, do not agree to expand the search to areas not covered in the warrant.
- Issues about the scope of the warrant and whether a document should be seized will be addressed by the court.
- Do not answer any substantive questions.
- Do not impede the search team.
- Identify and segregate documents subject to solicitor-client privilege.
- Search team members will generally be considerate about copying key documents that are needed by the target to continue their business.

**WIRETAPS**

Section 184.2 of the *Criminal Code* permits the Commissioner to intercept private communications if at least one party to the communication consents and there are reasonable grounds to believe that an offence under the Act has been, or is about to be,

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<sup>35</sup> This list is a compilation of suggestions from John F. Clifford and J. William Rowley, *supra* note 25, and W. Thomas McGrough Jr., "Search and Seizure in the U.S. - Surviving a Search Warrant" Spring 1996 Antitrust (ABA) Vol. 10, No.2.

committed. Recent amendments to the *Criminal Code* (brought about by Bill C-20) permit the Commissioner to intercept private communications *without* the consent of any of the parties if he believes on reasonable grounds that an offence of price-fixing, bid-rigging or deceptive telemarketing has been, or is about to be, committed.<sup>36</sup>

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

- the facts upon which the application is based;
- the type of communication to be intercepted;
- the names, addresses and occupations, if known, of the persons whose communications are to be intercepted;
- the nature and location of the place, if known, at which communications are to be intercepted;
- the manner of interception to be used;
- the length of time for which the wiretap is requested; and
- whether other investigative procedures have been tried and failed or why it appears they are unlikely to succeed.<sup>37</sup>

As a precondition to authorizing a wiretap, a judge must be satisfied that it is in the best interests of the administration of justice and that other investigative procedures have been tried, have failed or are unlikely to succeed.<sup>38</sup>

The wiretap provisions are new and untested. The Bureau insists that wiretaps will only be used in exceptional circumstances,<sup>39</sup> and that the likelihood of inappropriate

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<sup>36</sup> Bill C-20, 1999 c.2, assented to March 11, 1999, section 47. The Bill C-20 amendment changes the definition of “offence” under section 183 of the *Criminal Code* to allow the Bureau to apply for judicial authorization to intercept private communications without consent for investigating suspected violations of: the new deceptive marketing practices portions of the telemarketing provisions found in subsection 52.1(3) of the *Competition Act*; the conspiracy provisions in relation to any matters referred to in paragraph 45(4)(a) to (d)(1) (price fixing or market sharing); and the bid-rigging provisions found in section 47.

<sup>37</sup> *Criminal Code*, R.S.C. 1985, c.C-46, s. 185(1).

<sup>38</sup> *Ibid.* at s. 186(1).

<sup>39</sup> Competition Bureau, “Interception of Private Communications” 22 February 1999.

material being collected will be outlined in its application. The Bureau also will include in its application a requirement for direct or ongoing monitoring under which interception must be discontinued as soon as it becomes clear that privileged solicitor-client communications is involved.

## **IMMUNITY**

To encourage reporting of offences and early cooperation in criminal matters, the Bureau has adopted an immunity program under which immunity from prosecution or favourable treatment may be available. Immunity refers to an agreement by the Crown to refrain from prosecuting someone for a crime or crimes, or to terminate proceedings, in return for testimony or evidence.<sup>40</sup> By contrast, an individual who receives favourable treatment is still subject to a penalty, however it is less severe than it otherwise would have been.

In May 1999, the Bureau released a draft “Cooperating Parties Program Information Bulletin”<sup>41</sup> explaining its policies and procedures relevant to the granting of immunity for offences under the Act. The Bulletin describes the roles and responsibilities of the Commissioner and the Attorney General (“AG”), the conditions for granting immunity requests, and the various stages of the immunity process.

The Bulletin replaces the Bureau’s prior immunity program which had never been formally set out, but which was derived from a series of public statements by senior Bureau officials. The previous approach distinguished between pre- and post-investigation whistle-blowing. Assuming all other conditions were met, where the individual or corporation approached the Bureau before an investigation had commenced, the Bureau *would* recommend immunity to the AG; if the Bureau was already aware of the matter, it *might* have recommended immunity. In contrast, the recent Bulletin simply

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<sup>40</sup> While the Attorney General (“AG”) has sole authority to grant immunity for offences under the Act, it has been customary for the Competition Bureau to provide an assessment of the situation and make a recommendation to the AG when a request for immunity has been received.

<sup>41</sup> Commissioner of Competition, “Cooperating Parties Program Bulletin” (Ottawa: Competition Bureau, 1999)



states that the Commissioner is most likely to recommend that full immunity be granted where the party comes forward with valuable and important evidence of a contravention of which the Bureau is otherwise unaware or is unable to obtain sufficient evidence to warrant a referral to the AG.<sup>42</sup>

The Bulletin makes it clear that an immunity recommendation will be made only if it is in the “public interest.”<sup>43</sup> In considering whether an immunity recommendation is likely to be in the public interest, the Commissioner will be guided by, among others, the following factors and conditions:

- the party must provide full, frank and truthful disclosure; the reliability of the information provided must be established;
- the party must co-operate fully, at its own expense, with the Bureau’s investigation and any ensuing legal proceedings;
- the party must remain credible throughout the proceedings; and
- the party must confirm that it terminated (or is prepared to terminate) the illegal activity in question, and that it reported it to the Bureau as soon as it was discovered.<sup>44</sup>

The party’s role in the activity will also be considered. The Bulletin points out that it may not be consistent with the administration of justice to recommend full immunity for the instigator of criminal conduct, or to the key proponent or beneficiary of an offence. Timing is another important consideration, as the party who is “first-in” is likely to have the most compelling factual position to support its immunity request, relative to subsequent cooperating parties.

The Bulletin also comments on issues that arise in international criminal enforcement. Where illegal anti-competitive activity, such as a world-wide cartel, falls

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<sup>42</sup> *Ibid.* §4.0

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* §4.1

under the jurisdiction of more than one antitrust authority, such authorities may decide to pursue independent, joint or parallel investigations. The Bureau's position is that parties will not be afforded favourable treatment in Canada simply because they were granted immunity for having been "first-in" in another jurisdiction.<sup>45</sup> It is important therefore that clients who wish immunity avail each competition law authority early.<sup>46</sup>

Other important issues addressed in the Bulletin include confidentiality, obstruction and perjury,<sup>47</sup> and the impact of corporate immunity on directors, officers and employees.<sup>48</sup> According to the Bulletin, the Bureau will not exchange information provided to it by an immunity applicant with foreign antitrust enforcers unless the applicant consents to such disclosure. With respect to directors, officers and employees, the Bulletin notes that each offer of cooperation will be evaluated for the benefit of the specific party who has approached the Bureau. However, if a corporation qualifies for full immunity, all directors, officers and employees (and potentially its affiliates) who admit their involvement in the illegal activity will automatically qualify for the same immunity, subject to complying with the factors and conditions set out above.

## **WHISTLEBLOWING**

In an attempt to further encourage cooperation and reporting of offences, the Act recently was amended to protect whistleblowers.<sup>49</sup> Under s. 66.1 of the Act, any person may call the Bureau if they believe an offence has been or will be committed, and their identity will remain confidential if requested.<sup>50</sup> "Whistleblowing" might therefore relate to offences thought to be committed by an informant's employer, co-worker, or any other person. The Act prohibits employers from (i) taking reprisals against any employee who

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<sup>45</sup> *Ibid.* §8.2

<sup>46</sup> *Ibid.* §§8.3 and 8.4

<sup>47</sup> *Ibid.* §11.0

<sup>48</sup> *Ibid.* Part VI

<sup>49</sup> Bill C-20, *supra* note 36 at s. 19.

<sup>50</sup> *Competition Act, supra* note 2 at s. 66.1(1) and (2).

reports activities to the Bureau in good faith and based on a reasonable belief that the actions contravened the Act;<sup>51</sup> (ii) disciplining employees for refusing or stating an intention of refusing to do anything that is an offence under the Act; or (iii) disciplining employees for having done or stated an intention of doing anything that is required to be done in order that an offence not be committed under the Act.<sup>52</sup>

Violation of whistleblower provisions of the Act is punishable on indictment by a fine at the court's discretion and/or a maximum imprisonment of five years, and on summary conviction by a fine of up to \$200,000 and/or imprisonment up to one year. Given the severity of these penalties, counsel ought to be extremely careful in advising employers with respect to any disciplinary action that they intend to take against employees: should an antitrust matter be involved, virtually any punitive action may trigger the new provision. In the words of one corporate counsel, "[t]he proposed criminal liability of employers will create a minefield for them in disciplining employees."<sup>53</sup>

Counsel also ought to be wary of potential conflicts between the interests of employers and of employees. By way of example, if a director requests advice on potential reprisals should they blow the whistle on the corporation, it is essential that counsel inform the director that they represent the corporation, and that they can only provide legal advice to the corporation. If the company has not decided to report illegal activities, but the director wishes to report it in his personal capacity (to take advantage of immunity provisions) corporate counsel cannot advise the director.

There is some debate as to whether corporate counsel should be required to tell the whistleblower to obtain independent legal advice, or whether that suggestion amounts

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<sup>51</sup> *Ibid.* at s. 66.2.

<sup>52</sup> *Ibid.* at s. 66.2 (1) (b) and (c).

<sup>53</sup> Robert Patton, "Canadian Parliamentary Committee Proposes Whistleblower Legislation" (Summer 1998) *ABA International Antitrust Bulletin* Vol 1, Issue 2 at p.13.

to legal advice itself.<sup>54</sup> If the in-house lawyer suggests that the individual obtain independent legal advice, it is likely that another lawyer will inform the whistleblower of immunity provisions, which will then encourage that person to report. However, Rule 5, Commentary 14 of the *Ontario Rules of Professional Conduct* states that a where an individual is unrepresented, counsel should advise that individual of their right to independent legal advice.<sup>55</sup> The safest route may be for counsel to inform the potential whistleblower that they cannot act for him or her, and that he or she has the right to independent legal advice. Therefore, the in-house counsel is neither encouraging nor discouraging them to seek help elsewhere.

While the new whistleblower regime brought in by Bill C-20 deals with employee-informants, the Bulletin concerns all cooperating offenders. Taken together, these developments represent a more systematic and clearer approach by the Canadian competition authorities to those who wish to help the Bureau do its job.

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<sup>54</sup> Glenn Leslie, “Immunity for Whistleblowers - Counsel’s Ethical Obligations” (Competition Law and Competitive Business Practices, The Canadian Institute 12 June 1998).

<sup>55</sup> Law Society of Upper Canada, “Rules of Professional Conduct” Rule 5, Commentary 14.

## **JOINT DEFENCE AGREEMENTS**

If an antitrust investigation involves multiple parties, each of which share a common interest in the outcome of the investigation, it may be prudent for them to enter into a Joint Defence Agreement. These agreements, which express the parties' intention to rely on the common interest privilege (also known as the "joint defence privilege"), are intended to ensure the free-flow of privileged information between or amongst the parties, without constituting a waiver of the privilege that protects that information.

The common interest privilege, which has its antecedents in criminal law jurisprudence, is now, arguably, broad enough to protect the flow of information of parties sharing a common interest in the outcome of any sort of actual or anticipated litigation. Two conditions must be met for the common interest privilege to apply: (i) the communication for which the privilege is asserted must be privileged in the first place; and (ii) there must actually be a common interest between or amongst the parties seeking the privilege.<sup>56</sup> As long as a common interest privilege exists between or amongst parties, it cannot be unilaterally waived by one without the express consent of the other(s). Where the privilege lapses because the necessary mutuality of interests disappears, then either party can waive the privilege without the consent of the other.

The only Canadian case which addresses "joint defence agreements" held that communications by one accused to counsel for a co-accused in the course of the preparation of a joint defence are privileged. The decision suggested that it is not necessary to have an agreement formalizing the parties' intention to rely on the common interest privilege for the privilege to apply. That said, the unsettled state of law on common interest privilege makes it advisable to enter into such agreements.

### *Common Interest Privilege*

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<sup>56</sup> The privilege may be lost if the necessary mutuality of interests ceases to exist. This mutuality of interests will be lost, for example, when co-defendants become adversaries in litigation.

The common interest privilege is described in the *Canadian Encyclopaedic Digest (Ontario)* as follows: “[p]arties sharing a common interest in the outcome of litigation may disclose privileged communications to each other without waiving the privilege.”<sup>57</sup> Similarly, Sopinka has stated that:

[i]t may be necessary for certain outsiders such as a co-accused and their counsel to be present to assist in the preparation of a client’s defence.<sup>58</sup> Indeed, an exchange of confidential information between individuals who have a common interest in anticipated litigation is within the context of this privilege.<sup>59</sup>

Once there is a common interest privilege, the privilege becomes that of all the parties to whom the privileged information is disclosed.<sup>60</sup>

The leading case on common interest privilege is the English Court of Appeal decision in *Buttes Gas and Oil Co. v. Hammer (No. 3)* (“*Buttes Gas*”).<sup>61</sup> In that case, it was held that privilege applied where two persons had a common interest in anticipated litigation, shared a common solicitor and exchanged information for the purpose of informing each other of the facts or advice received in respect of litigation. Lord Denning described the nature of the interest as follows:

That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels’ opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each

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<sup>57</sup> *Canadian Encyclopedic Digest (Ontario)*, Volume 11 (Evidence) at §1056; citing as authority *Lehman v. Ins. Corp. Of Ireland* (1983), 40 C.P.C. 285 (Man. Q.B.) [hereinafter “*Lehman*”]; *Independent Fish Co. v. Manitoba Cold Storage Co.*, [1984] 1 W.W.R. 615 (Man. Q.B.), and *Vancouver Hockey Club Ltd. v. National Hockey League* (1987), 18 B.C.L.R. (2d) 91 (S.C.).

<sup>58</sup> *R. v. Dunbar and Logan* (1982), 138 D.L.R. (3d) 221, 69 C.C.C. (2d) 13, 28 C.R. (3d) 324 (Ont. C.A.).

<sup>59</sup> J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1998) at 760.

<sup>60</sup> *Vancouver Hockey Club Ltd. v. National Hockey League*, supra note 57.

<sup>61</sup> [1980] 3 All E.R. 475 (C.A.); var’ d for other reasons [1982] A.C. 888, [1981] 3 All E.R. 616 (H.L.).

as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.<sup>62</sup>

*For the Privilege to Apply the Communications Must be Otherwise Privileged*

By its very nature, the common interest privilege requires the communications to have been privileged in the first place, otherwise, there would be no concern about waiving an existing privilege by disclosure. Where the communications consist of both privileged and non-privileged communications, the common interest privilege will only extend to the privileged communications. In *International Minerals and Chemical Corp. (Canada) v. Commonwealth* ("*International Minerals*"),<sup>63</sup> the court required that certain communications be disclosed even though they contained some privileged information. These communications were to be edited to delete references to legal advice, given or requested, potential defences or settlement strategy, and information from the auditor's reports or expert reports which had previously been ruled privileged.<sup>64</sup>

*For the Privilege to Apply There Must Be a Common Interest*

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<sup>62</sup> *Ibid.* at 483-484.

<sup>63</sup> (1990), 47 C.C.L.I. 196 (Sask. Q.B.).

<sup>64</sup> *Ibid.* at 207.

The common interest privilege protects privileged communications exchanged between a party and a non-party,<sup>65</sup> as well as parties to the litigation,<sup>66</sup> so long as the persons claiming the privilege have a common interest with respect to the litigation.

There is little precise discussion in the case law on what constitutes a “common interest.” The case law does suggest that it is not necessary that the interest be identical. A “parallel” or “selfsame” interest (the latter having been acknowledged to be something less than “identical”) is said to be sufficient.<sup>67</sup>

This is consistent with the decision in *International Minerals* where the court, in accepting the common interest privilege, stated that the parties have a “parallel interest in the plaintiff’s claim, in varying degrees.”<sup>68</sup>

Other cases suggest that a common interest does not exist where there is a possibility that the parties claiming the interest may become adverse in interest in the future.<sup>69</sup> These cases also suggest that a common interest will not exist where the plaintiff has a very different type of claim against each of the parties claiming the privilege and there is a probability of a claimover.

### *Loss of the Privilege*

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<sup>65</sup> See for example, *Vancouver Hockey Club Ltd. v. National Hockey League*, *supra* note 57 and *Mitchell v. Adegbite*, [1992] B.C.J. No 2180 (B.C. S.C.) (Master) (QL).

<sup>66</sup> See for example, *R. v. Dunbar and Logan*, *supra* note 58 and *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 114 D.L.R. (4th) 526 (N.S. S.C.) [hereinafter “Maritime Steel”].

<sup>67</sup> In *Emil Anderson Construction Co. v. British Columbia Railway Co.* [1987] B.C.J. No. 165 (QL), the court stated that “[t]he terms “selfsame interest” and “identical interest” are used interchangeably with “common interest” in *Buttes Gas*. A careful reading of the decisions in that case leads me to the conclusion that “identical” is too strong a word, but “selfsame” is a good equivalent to “common” for the purposes of the doctrine.”

<sup>68</sup> *International Minerals*, *supra* note 63 at 207.

<sup>69</sup> See *Lehman*, *supra* note 57; applied in *Columbos v. Carroll* (1985), 23 C.P.C. (2d) 177 (Ont. H.C.J.); *rev’g* (1985), 1 C.P.C. (2d) 59 (Ont. S.C. Master); see also *Joseph v. Charlie* (1991), 57 B.C.L.R. (2d) 68 (B.C. S.C.) (Master); see also *Patterson v. Howell Estate*, [1993] O.J. No 1652 (O.C.G.D.) (Master); see also *Emil Anderson Construction Co. v. British Columbia Railway Co.*, *supra* note 67.



The common interest privilege will be lost if the necessary mutuality of interests no longer exists. This mutuality of interests will be lost, for example, when co-defendants become adversaries in litigation.

In *R. v. Dunbar and Logan* (“*Dunbar*”),<sup>70</sup> the court addressed the issue of whether the common interest privilege had been lost when one of the accused, B, decided to testify against his co-accused. The court stated:

... the inapplicability of the privilege where a controversy has arisen between the parties is confined to situations in which the once jointly represented clients have become pitted against each other in litigation. No case was cited to us in which the privilege was held to be destroyed because the clients had a falling out in a proceeding at the suit of a third person.<sup>71</sup>

Similarly, in *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.* (“*Maritime Steel*”),<sup>72</sup> the court found that the common interest privilege was lost when the parties to whom it applied cross-claimed against each other.<sup>73</sup>

#### *Necessity of An Explicit Agreement*

There is little mention of Joint Defence Agreements in Canadian case law (*Dunbar* is, in fact, the only case). By contrast in the United States, numerous cases have considered joint defence agreements. Some of that jurisprudence suggests that although an express agreement is not required to establish the existence of the privilege, it may be difficult to assert the existence of a joint defence arrangement absent an express agreement.<sup>74</sup>

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<sup>70</sup> *Supra* note 58.

<sup>71</sup> *Ibid.* at 246.

<sup>72</sup> *Supra* note 66.

<sup>73</sup> *Maritime Steel*, *supra* note 66 at 535-536.

<sup>74</sup> See generally, R. G. Morvillo, “Modernizing Joint Defense Agreements”, *New York Law Journal*, June 1, 1999, citing *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), citing, *inter alia*: *Matter of Bevill Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986); *United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20 (1st Cir. 1989); and *United States v. Keplinger*, 776 F.2d 678 (7th Cir.); cert. denied, 476 U.S. 1183 (1986). In *Schwimmer* it was held that a joint defence agreement could

Given the uncertainty in Canadian law, prudence dictates that parties wishing to work towards a joint defence of a Bureau investigation and share privileged communications ought to enter into a formal Joint Defence Agreement. Such an agreement affords the opportunity to clearly recite and reference all the necessary supporting facts and law. If later challenged, the parties will have a record, albeit self-serving, of the context and purpose of the information exchange. Moreover, a written agreement will draw the solicitors' attention to what may or may not be outside the scope of protection and to actions that are to be taken in specific circumstances that are not spelled-out in the law.

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

- precise identification of all the participants;
- a “common interest” provision that reflects whether the joint defence agreement is for a limited purpose or for the entire action;
- a provision stating that privileged information may be shared among the participants to the agreement, but that all participants intend to protect the information from disclosure to plaintiffs or third parties;
- a provision stating that privileged information will be used only pursuant to the terms of the agreement (*ie.*, for the purpose explicitly stated in the agreement”);
- a withdrawal provision; and
- (when appropriate) optional provisions regarding the governance of delegated tasks, a waiver of conflicts of interest, or a provision indicating that the participants have read and understand all of the provisions of the agreement.<sup>75</sup>

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not be inferred from the simple circumstance of a general purpose meeting held to discuss matters of common interest and that some agreement to undertake a joint strategy of representation is required to support the joint defence privilege.

<sup>75</sup> Adapted from Paul J. Malak, “Drafting a Joint Defense Agreement” The Practical Litigator (American Law Institute-American Bar Association Committee on Continuing Professional Education, 1997).

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