

Competition, Antitrust and Foreign Investment

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Ontario Court Orders Production of Certain Proffer Information to Accused Co-Conspirators

The recent decision of the Ontario Superior Court of Justice in the ongoing “Chocolate” price-fixing conspiracy case may have important implications for companies seeking immunity or leniency from the Competition Bureau for price-fixing conspiracies. In *R. v. Nestle Canada Inc.*, the Court held that “factual information” provided to the Competition Bureau through the “proffer process” when applying for immunity or leniency must be produced to the accused co-conspirators in subsequent criminal proceedings. As a result of this decision, companies considering applying for immunity or leniency or conducting an internal investigation should give early and careful consideration to how they approach the application process and internal investigation.

Background

The decision arises in a motion in the ongoing “Chocolate” price-fixing conspiracy case. At issue was whether information provided by Cadbury and Hershey’s to the Competition Bureau when they applied for immunity and leniency had to be disclosed to their co-conspirators who were subsequently charged in criminal proceedings. The Competition Bureau’s immunity and leniency programs are “whistleblower” programs: participants in an illegal conspiracy may qualify for either immunity from prosecution or leniency in sentencing if they provide useful information to the Competition Bureau that allows the Competition Bureau to bring prosecutions against the co-conspirators.

Under both of these programs, an applicant first obtains a “marker” indicating the order in which they alerted the Competition Bureau to the conspiracy. Immunity from prosecution is available to the first whistleblower, whereas leniency in sentencing may be offered to subsequent whistleblowers. However, before immunity or leniency is granted, the applicant must provide a “proffer” of information to the Competition Bureau to allow it to decide whether or not the information is sufficient to aid the Competition Bureau in an investigation and subsequent prosecution of the co-conspirators.

In the Chocolate case, Cadbury had applied for and obtained immunity and Hershey had applied for and obtained leniency. At issue in the motion was whether or not, and to what extent, information provided by Cadbury and Hershey during the proffer stage had to be disclosed to the accused co-conspirators in subsequent criminal proceedings. There was no dispute that any documents provided by Cadbury and Hershey after the immunity and leniency agreements were entered into with the federal Director of Public Prosecutions had to be produced. Disclosure was opposed on the basis that the information was protected by solicitor client privilege or settlement privilege.

The Decision

The Court held that solicitor-client privilege does not apply to any information provided to the Competition Bureau, since the Competition Bureau is an adverse party to the applicant. The Court also held that settlement privilege does not apply to prevent the disclosure of “factual information” provided by immunity or leniency applicants during the proffer stage. The Court reasoned that since settlement privilege is not an absolute privilege, it must yield to

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the accused's constitutionally protected right to make full answer and defence. The Court held that even if settlement privilege applied, the privilege was waived as a result of the provisions of the immunity and leniency agreements, both of which expressly acknowledged that information provided to the Competition Bureau could be disclosed in subsequent criminal proceedings. The Court was also influenced by the fact that the very purpose of the immunity and leniency programs is to provide internal investigation and the immunity/leniency information to the Competition Bureau that can be used in subsequent criminal proceedings against the co-conspirators. The Court relied on among other things, the Competition Bureau's 2010 Leniency Bulletin that noted that all information provided by the applicant prior and pursuant to the plea agreement may be used by the Bureau in any subsequent prosecution against other parties to the conspiracy.

The decision appears to be limited to those situations in which an immunity or leniency agreement is reached after the proffer of information in the application process, since if no agreement is reached, information provided to the Competition Bureau's investigations is intended to be kept confidential and not used against the applicants if immunity or leniency is not granted.

The Court also noted that disclosure is limited to "factual information", and does not extend to other information such as legal opinions, negotiation, communications or views expressed on the relevant importance of various information shared during the proffer stage, since such information is not relevant or admissible evidence in the criminal proceedings. Factual

information that could be required to be disclosed may include documents given to the Competition Bureau during the proffer process, as well as the Competition Bureau officers' notes of other potential evidence they were advised might be provided by the applicant, such as a description of what potential witnesses may say about the events or documents related to the matter.

Importance for Canadian Companies

The decision of whether to make an application for immunity or leniency to the Competition Bureau must be made carefully yet quickly, as it is literally a race against the clock. Companies conducting an internal investigation or contemplating making an application for immunity or leniency must consider early in the process how they will approach the investigation and application process in order to best protect their information. As a result of this decision, companies must carefully consider (i) what information is provided to the Competition Bureau at the proffer stage; and (ii) how that information is provided, since such information could subsequently be made available to, and used by, counsel for an accused in an open court proceeding and thereby potentially be made available to be used in subsequent civil proceedings for damages in Canada (as was recently affirmed by the Supreme Court of Canada in *Jacques c. Petroles Irving Inc.*).

For more information on this decision or the Competition Bureau's immunity or leniency programs, contact any member of our Competition or Litigation Groups.