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No Chance At Immunity: examining the possibility of immunity provisions for drug crimes in the Criminal Code

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No Chance At Immunity: examining the possibility of immunity provisions for drug crimes in the Criminal Code

Abstract

Many members of the public fear crimes committed by strangers despite statistics showing greater danger from friends, acquaintances, and relatives. Since this fear is rooted in the fear of the unknown, some people prefer to fall victim to white-collar crimes as opposed to street crimes. Since most white-collar crimes require gaining the victim's trust, many are committed by people that know the victim. Moreover, the traditional view of white-collar criminals as people of high respectability and social class drastically influences our perception of crime and can lead to significant societal implications.

In Canada, this traditional view of white-collar criminals is reflected in criminal legislation. Not only are the actions of white-collar offenders less likely to be criminalized and prosecuted but also the punishments enacted are typically much less severe than for street crimes. In a regime without the possibility of life imprisonment and minimum sentencing, there is instead a program offering immunity and leniency.

In this paper, the author discusses the possible adoption of an immunity program in the context of cartel-level drug trafficking, since current methods of law enforcement aimed at penalizing organized drug trafficking lack deterrent value. Establishing an immunity program for cartel-level trafficking would have the immediate effect of excusing the criminality of a few low-level criminals, while having the underlying effect of enhancing deterrence and, potentially, dismantling extremely damaging criminal organizations.

NO CHANCE AT IMMUNITY

BENJAMIN D. SCHNELL*

INTRODUCTION

Many members of the public fear crimes committed by strangers despite statistics showing that a greater danger from friends, acquaintances, and relatives exists.¹ Because this fear is rooted in the fear of the unknown, some people *prefer* to fall victim to white-collar crimes as opposed to street crimes.² This is because most white-collar crimes are committed by people who know the victim, since they require gaining the victim's trust.³ As described by Gary Potter and Karen Miller, "few of us would think of engaging in daily social intercourse with armed robbers,"⁴ but "we are dependent on criminals for our very survival in the case of white-collar crime."⁵ In addition, the traditional view of white-collar criminals as people of high respectability and social class drastically affects our perception of crime and can lead to significant societal implications.

In Canada, this traditional view of, and preference for, white-collar criminals is reflected in criminal legislation. Not only are the actions of white-collar offenders less likely to be criminalized and prosecuted,⁶ but the punishments enacted are also typically much less severe than for street crimes.⁷ For example, drug trafficking, which is

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¹ Gary W Potter & Karen S Miller, *Controversies in White-Collar Crime* (New York: Routledge, 2001) at 4.

² David O Friedrichs, *Trusted Criminals: White Collar Crime in Contemporary Society*, 4th ed (Belmont: Wadsworth Cengage, 2010) at 9.

³ Potter, *supra* note 1 at 4–23.

⁴ *Ibid* at 23.

⁵ *Ibid*. Through the interplay between companies and individuals committing white-collar crime and the markets, these criminals have a significant impact in our day-to-day lives.

⁶ Friedrichs, *supra* note 2 at 9. See also Hongming Cheng, "Insider Trading in China: The Case for the Chinese Securities Regulatory Commission" (2008) 15:1 J Fin Crime 165; Hongming Cheng & Ling Ma, "White-Collar Crime and the Criminal Justice System: Bank Fraud and Corruption in China" (2009) 16:1 J Fin Crime 166; Hongming Cheng, "Cheap Capitalism: A Sociological Study of Food Crime in China" (2012) 52:1 Bri J Crim 254.

⁷ Paul Jesilow, Henry N Pontell & Gilbert Geis, *Prescription for Profit: How Doctors Defraud Medicaid* (Berkeley: University of California Press, 1993) at 71.

traditionally viewed as a street crime, is regulated by the *Criminal Code of Canada (Code)*⁸ but codified under the *Controlled Drugs and Safety Act (CDSA)*⁹ and prosecuted by the federal Public Prosecution Service of Canada (PPSC). It carries significant inherent penalties.¹⁰ For example, a person convicted of trafficking drugs at the direction of or in association with a criminal organization will be subjected to a minimum imprisonment of one year,¹¹ and multiple offenses under the *CDSA* carry with them the potential penalty of life imprisonment. In contrast, the *Competition Act* (henceforth, the *Act*), which regulates white-collar offenses, does not contemplate life imprisonment.¹² These potential penalties are reflective of society's view on the seriousness of drug trafficking and, by extension, street crimes.

Despite this strict enforcement regime, Canadian drug trafficking prohibitions are ineffective and fail to adequately deter prospective criminals within criminal organizations.¹³ Most drug trafficking is covert, often embedded in social networks, and offenders often commit crimes at the direction of more senior members of their cartels.¹⁴ Moreover, cartels often control physical land and the lives and safety of the individuals within that space—innocent or not.¹⁵ Indeed, most drug trafficking offenders who want to leave criminal organizations are not only subjecting themselves to penalization from the justice system but also to penalization from that organization. In other words, the enforcement mechanisms do not reflect the realities of the offence.

Another concern with the current regulatory regime is that without a dismantling of the criminal organization, those potential criminals who wish to escape face the potential of falling victim to physical violence. For example, in Los Angeles, it is not uncommon for members to be “beaten out” of the gang.¹⁶ In Arizona, research indicates that one out of five gang exits are hostile, and that one-third of people who left a gang because of reasons internal to the gang experience hostile departures.¹⁷ Public Safety Canada has similarly acknowledged this phenomenon and highlighted that the easiest way to leave a criminal organization is through a significant life event (e.g., marriage)

⁸ *Criminal Code*, RSC 1985, c C-46, s 462.1.

⁹ *Controlled Drugs and Substances Act*, SC 1996, c 19, s 10(1) [CDSA].

¹⁰ Canada, Public Prosecution Service of Canada, *Deskbook*, Catalogue No J79-2/2014E-PDF, (Ottawa: Director of Public Prosecution, 1 March 2014) at Part III: Procedural Issues and Trial Practice - 3.3 Immunity Agreements [Public Prosecution Service of Canada, “Deskbook”].

¹¹ *CDSA*, *supra* note 9, s 5(3)(a)(i)(A).

¹² Public Prosecution Service of Canada, “Deskbook”, *supra* note 10 at Appendix B.

¹³ Law Commission of Canada, *Major issues relating to organized crime: within the context of economic relationships*, (Ottawa: Law Commission of Canada, 1999).

¹⁴ Jonathan P Caulkins & Peter Reuter, “Towards a harm-reduction approach to enforcement” (2009) 8:1 Safer Communities 9 at 16.

¹⁵ *Ibid.*

¹⁶ James Diego Vigil, *Barrio gangs: Street life and identity in Southern California*, (Austin: University of Texas Press, 1988) at 81.

¹⁷ David C Pyrooz & Scott H Decker, “Motives and methods for leaving the gang: Understanding the process of gang desistance” (2011) 39 J Crim Justice 417 at 422.

and that, otherwise, abrupt departure is difficult and exposes the individual to severe and potentially violent consequences.¹⁸ The structure of such criminal organizations, the risks of violence associated with such crimes, and the justice system's harsh penalties make it extremely undesirable for these offenders to come forward and admit to their involvement in these offenses.

Despite the apparent "street crime" nature of drug offences, cartel-level drug trafficking shares many characteristics with white-collar crimes. Members at the top of criminal organizations and cartels are often sophisticated, covert, and calculating enough that they commit crimes opportunistically and through the employment of specialized knowledge. In this sense, cartel members are no different than white-collar criminals. The question becomes, then, how can our justice system properly address this reality?

This paper will provide an answer to this question. As will be shown, the Competition Bureau has successfully implemented an Immunity Program to enhance the detection and deterrence of white-collar crimes. A similar immunity program should be adopted for instances of cartel-level drug trafficking, where an offender's conduct is non-violent and where she fully cooperates by providing information about the higher-ranking members of the cartel.

I. BACKGROUND

The Criminal Code

The *Code* was first enacted in 1892 and exists to protect society as a whole from crime.¹⁹ It accomplishes this by facilitating the detection and prosecution of criminal actions, while also affording protection to the rights of the accused.²⁰ Criminal actions are, broadly speaking, those actions society deems to be unacceptable. The offences of the *Code* range from violent (e.g., assault)²¹ to non-violent conduct (e.g., gambling),²² and include both street crimes and white-collar crimes.²³ In this context, organized drug trafficking is considered a street crime.²⁴

For violations of the *Code*, an accused is usually afforded an opportunity to participate in plea bargaining to receive a lighter sentence.²⁵ In more narrow

¹⁸ Public Safety Canada, *Organized Crime Research Highlights*, Number 2 (Ottawa: Public Safety Canada, 2015) at 2–3.

¹⁹ *Criminal Code*, 1892, SC 1892, c 29.

²⁰ *Ibid.*

²¹ *Criminal Code*, *supra* note 8, s 265.

²² *Ibid.*, s 201.

²³ See e.g. *ibid.*, s 380.

²⁴ *Ibid.*, ss 462.37(2.02)(a)–(b), 467.11(1).

²⁵ Province of Ontario Ministry of Attorney General, *Crown Policy Manual: Resolution Discussions*, (Toronto: Ontario Ministry of the Attorney General, 2005).

circumstances, an accused may be able to rely on informer privilege, through which she exchanges information for protection from prosecution.²⁶

When an individual is found guilty of an offence, she is subjected to a sentencing hearing to determine an appropriate penalty, such as a fine or imprisonment.²⁷ The fundamental principles of sentencing are outlined in section 718 of the *Code* and are as follows: (1) specific and general deterrence; (2) denunciation; (3) rehabilitation; (4) the promotion of a sense of responsibility in an offender; (5) reparations for the victim; and (6) where necessary, the separation of an offender from society.²⁸ The overarching goal is to stop and prevent similar activities from happening in the future.²⁹

The Controlled Drugs and Substances Act

The first statutory prohibition of drugs in Canada was through the *Opium Act* in 1908. After numerous amendments and intermediary pieces of legislation, in May 1997 Parliament reformed the regulation of drug trafficking through the *CDSA*. These pieces of legislation have led to “criminal record[s] for hundreds of thousands of Canadians.”³⁰ While trafficking offenses are not enumerated under the *Code*, the *CDSA* has significant interplay with the *Code*, particularly when it comes to criminal organizations and cartels.³¹ Violations of the *CDSA* are dealt with in the same manner as violations of the *Code*: both plea bargaining and informer privilege are available to prosecutors and the accused.³²

The Competition Act

In 1889, for the first time, Canada enacted legislation in the area of competition: *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*.³³ In 1912, the Supreme Court of Canada (SCC) verified the Act’s overall

²⁶ *R v Leipert* [1997] 1 SCR 281 at paras 6–33 [*Leipert*].

²⁷ *Criminal Code*, *supra* note 8, s 718.3.

²⁸ *Ibid.*, s 718.

²⁹ *Ibid.* (“[T]he fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law...”. While other subsidiary goals are mentioned, the first and principle goal is to protect society through crime prevention, which is synonymous with deterrence.)

³⁰ Diane Riley, *Drugs and Policy in Canada: A Brief Review & Commentary* (Ottawa: Canadian Foundation for Drug Policy, 1998) at 1–18.

³¹ *Criminal Code*, *supra* note 8, ss 462.37(2.02)(a)–(b), 467.11(1).

³² Public Prosecution Service of Canada, “Deskbook”, *supra* note 10 at Part VI: Sentencing Matters - 6.2 Mandatory Minimum Penalties for Certain Drug Offences under the *Controlled Drugs and Substances Act*, Part III: Procedural Issues and Trial Practice - 3.7 Resolution Discussions.

³³ Calvin S Goldman & J D Bodrug, *Competition Law of Canada* (Huntington, NY: Juris Publishing Inc, 2003) at §1.05.

purpose, confirming its existence as being rooted in the protection of the public interest of free competition.³⁴ According to Justice Brian Dickson (as he then was),

The statute was motivated by concern over the emergence in Canada of smaller versions of the huge trusts in the United States, through which a few personalities could control enormous financial empires. The combines problem was seen as one with strong moral overtones and criminal sanctions were selected as the appropriate means for its control.³⁵

The original statute prohibited preventing or lessening competition by conspiracy, combination, agreement, or arrangement.³⁶ Today, the *Act* governs such concerns.³⁷ The current goals are to

maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.³⁸

While not overtly stated, this description conveys an intention to prevent corruption.³⁹

The *Act* ensures that small and medium-sized enterprises have equitable opportunity to participate in the Canadian economy, largely through its regulation of cartels.⁴⁰ Part four of the *Act* sets out criminal competition offences.⁴¹ Specifically, the provisions guard against conspiracy, bid-rigging, false representation, and other anti-competitive acts.⁴² These acts are necessarily white-collar and are generally non-violent, and violations can lead to fines and imprisonment.⁴³ For example, the conspiracy provisions carry a maximum fine of \$25 million and fourteen years imprisonment.⁴⁴

³⁴ *Ibid.*

³⁵ *Attorney General (Canada) v Canadian National Transportation Ltd*, [1983] 2 SCR 206 at 250. The “combines problem” was an issue the original *Act* attempted to resolve.

³⁶ James Musgrove, *Fundamentals of Canadian Competition Law*, 2nd ed (Toronto: Carswell, 2010).

³⁷ *Competition Act*, RSC 1985, c C-34.

³⁸ *Ibid.*, s 1.1.

³⁹ Competition Bureau, “Co-operation between anti-corruption and competition authorities”, presented by the Commissioner of Competition at the Joint Meeting of the OECD Competition Committee (Paris France: 14 June 2016).

⁴⁰ Canada, Competition Bureau, “Small and Medium Enterprises” (Ottawa: 5 November 2015).

⁴¹ *Competition Act*, *supra* note 37, ss 45–62.

⁴² *Ibid.*

⁴³ *Ibid.*, s 45(2).

⁴⁴ *Ibid.*

Under the appropriate circumstances, however, the violations of some of these provisions are resolved through the Competition Bureau's Immunity Program.

II. THE NEED FOR IMMUNITY

In the following section, I argue that an immunity program should be adopted as a tool for the detection and deterrence of cartel-level drug trafficking. There are three reasons to support this proposition. First, the *Code* and the *Act* both exist to control the prevention and deterrence of activities. Second, while deterrence can effectively be achieved in different ways, in the context of cartel-level drug trafficking, deterrence is best realized by using an immunity program. This is because efficacious deterrence of cartel-level trafficking necessitates the disruption of the cartel itself, which requires information from its participants. Given that the Competition Bureau has achieved deterrence by dismantling white-collar criminal organizations through its Immunity Program, it will serve as a model for this discussion. Finally, a new method of enforcement is necessary, as the existing tools of plea bargaining and informer privilege do not properly achieve deterrence.

Legislative Goals: the *Criminal Code* and the *Competition Act*

Deterrence is a common feature of both the *Code* and the *Act*. As described by Canadian law professor Michael J. Trebilcock, criminal prosecution under the *Act* is meant to achieve compliance in the same manner as any other criminal prosecution: through the specific deterrence of the offender and the general deterrence of other potential violators.⁴⁵ Overall, the purpose of the *Act* is to regulate and prevent anti-competitive practices within the Canadian marketplace through the enactment of penalties as a means of deterrence.⁴⁶ Similarly, the underlying purpose of the *Code* is to prevent and curtail behavior in the future. In both cases, the legislation attempts to reduce the burden upon society by deterring the specific perpetrator and any would-be perpetrators from engaging in such behaviour.

However, deterrence can be achieved in different ways. For certain types of crimes (e.g., theft), massive financial penalties are the appropriate tool to prevent future illegal conduct.⁴⁷ For other crimes, particularly those committed by companies and

⁴⁵ Michael J Trebilcock, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 756.

⁴⁶ See Canada, Competition Bureau, "Immunity Program under the *Competition Act* – Introduction", Information Bulletin (Ottawa: 7 June 2010) [Competition Bureau, "Immunity Program"]. According to one of their own bulletins, the Competition Bureau's objective in seeking penalties for violations of the *Competition Act* "is to stop criminal acts and to deter companies and individuals from engaging in similar behavior in the future."

⁴⁷ See Peter Cleary Yeager, "The Practical Challenges of Responding to Corporate Crime" in Shanna R Van Slyke, Michael L Benson & Francis T Cullen, eds, *The Oxford Handbook of White-Collar Crime*

cartels, such as bid-rigging, deterrence is best achieved by destabilizing the organization through an immunity program.⁴⁸ In the next section, I will argue that cartel-level drug trafficking is akin to white-collar crimes, and as such should be enforced using similar measures such as the Immunity Program. This is necessary to effectively tackle the source of the criminal activity—the criminal organization or enterprise—rather than the offender.

Comparing White-Collar Crime to Cartel-Related Drug Trafficking

White-Collar Crime

In 1940, Edwin H. Sutherland introduced the concept of white-collar crime, distinguishing it from street crime. He defined it as a subset of criminal activity committed by people of respectability and high social status.⁴⁹ Since Sutherland's initial characterization, many have revised the definition, stating that such crimes are not limited to high-status individuals, but rather to professionals who have specialized knowledge or experience that ordinary people lack.⁵⁰ Examples of white-collar crimes include price-fixing and bid-rigging. Many of these offences are regulated under the *Act*.⁵¹

Categorically, white-collar crimes are committed by those in positions of privilege, often within the business world. According to Robert Merton's Strain Theory, a majority of crimes occur out of necessity. This is because there is a divide between the offender's aspirations and the means she has of attaining them. This gap is then bridged by illegitimate means.⁵² Therefore, crime becomes the means or opportunity of achievement. Following the work of Émile Durkheim, leading sociologists Richard Cloward and Lloyd Ohlin have also argued in their Criminal Opportunity Theory that most criminals make rational choices and choose targets and methods that offer high rewards with as little effort or risk as possible.⁵³ To this end, the commission of any

(Oxford: Oxford University Press, 2016) at 645–654. Most crimes, particularly economic ones, will be effectively deterred by massive penalties.

⁴⁸ European Commission, "About the Cartel Leniency Policy" (4 January 2016), online: <<http://ec.europa.eu/competition/cartels/leniency/leniency.html>>. See also Peter Cleary Yeager, "The Practical Challenges of Responding to Corporate Crime" in Shanna R Van Slyke, Michael L Benson & Francis T Cullen, eds, *The Oxford Handbook of White-Collar Crime* (Oxford: Oxford University Press, 2016) at 655–657.

⁴⁹ Edwin H Sutherland, "White-Collar Criminality" (1940) 5:1 *Am Soc Rev* 1 at 2.

⁵⁰ Michael K Benson & Sally S Simpson, *White-Collar Crime: An Opportunity Perspective* (New York: Taylor and Francis, 2009) at 212.

⁵¹ *Competition Act*, *supra* note 37.

⁵² Daniel S Murphy & Mathew B Robinson, "The Maximizer: Clarifying Merton's Theories of Anomie and Strain" (2008) 12:4 *Theoretical Criminology* 501 at 502–05.

⁵³ Richard Cloward & Lloyd Ohlin, *Delinquency and Opportunity: A Theory of Delinquent Gangs* (New York: Taylor and Francis, 1960).

crime requires two things: the motivation to effect it and the opportunity to do so.⁵⁴ Thus, opportunity can limit the types of crimes committed.⁵⁵ For example, those who are employed in relatively unskilled environments and live in inner-city areas have fewer situations to exploit and may only have the opportunity to engage in street crimes.⁵⁶ While the key feature of white-collar crime is opportunity, the most prevalent feature of street crime is necessity.

Accordingly, white-collar criminals are able to deploy their specialized knowledge towards more risk-averse opportunities. They are generally rational in weighing the costs and benefits of their behavior⁵⁷ and driven by either a desire to be successful⁵⁸ or a fear of falling from one's current level of success.⁵⁹ Therefore, white-collar crimes are often committed to bolster one's income, opportunity for advancement, and ability to negotiate. For example, a company executive's hiding of losses through the use of shell companies might bolster stock prices, thereby raising the value of the parent company while deceiving investors.⁶⁰ Generally, white-collar crimes are committed out of opportunity and as a means to bolster one's socioeconomic status. This differs from necessity-based street crimes such as robbery, as discussed in the next section.

Cartel-Level Drug Trafficking

Most street crimes are committed out of necessity, not opportunity, and can be committed without special skills or knowledge. They are generally conducted by hastily and loosely formed groups of individuals with the common goal of gaining illicit profits through immediate criminal acts.⁶¹ The principal goal is often to achieve quick financial gains to alleviate one's desperate circumstances.⁶² However, when examining the

⁵⁴ *Ibid.*

⁵⁵ John Lofland, *Deviance and Identity* (New Jersey: Prentice Hall, 1969).

⁵⁶ Ronald V Clarke, *Situational Crime Prevention: Successful Case Studies*, 2nd ed (New York: Harrow and Heston, 1997) at 16–24.

⁵⁷ Neal Shover & Francis T Cullen, "Studying and Teaching White-Collar Crime: Populist and Patrician Perspectives" (2008) 19:2 J Crim Jus Edu 155 at 156–70.

⁵⁸ Wei Wang & Hongming Cheng, "The Credibility of Oversight and Aggregate Rates of White-Collar Crime" in Letizia Paoli, ed, *The Oxford Handbook of Organized Crime* (Oxford: Oxford University Press, 2014) at 543.

⁵⁹ Nicole Leeper Piquero, "The Only Thing We Have to Fear is Fear Itself: Investigating the Relationship Between Fear of Falling and White Collar Crime" (2012) 58:3 Crime & Delinquency 362 at 362–79.

For a detailed discussion of this type of violation, read about the Enron Scandal in Bala G Dharan & William R Burfkins, *Enron: Corporate Fiascos and Their Implications* (Eagan, MN: Foundation Press, 2004).

⁶⁰ Martinez, Joseph P., "Unpunished Criminals: The Social Acceptability of White Collar Crimes in America" (2014). *Senior Honors Theses*. Paper 382. online:

<<http://commons.emich.edu/cgi/viewcontent.cgi?article=1381&context=honors>> at 21.

⁶¹ *Ibid.*

⁶² *Ibid.*

traditional views of street crimes, one notable exception arises. Cartel-level drug trafficking, while generally viewed as a street crime, shares more characteristics with white-collar crime than with street crime. These reasons are set out below.

First, like white-collar crime, cartel-level drug trafficking involves a complex, organized structure. Many offenders partake in organized criminal activities with a network of accomplices or co-offenders.⁶³ Statistics show that certain specific illicit activities, including drug trafficking, are more likely to involve co-offenders.⁶⁴

Second, just as white-collar crimes are generally committed out of an opportunity for competitive advantage, many of the organizing features of drug trafficking are similar. Martin Bouchard and Carlo Morselli argue that “organized crime (or a criminal market) is largely a resource pooling process that is built around individuals who are connected (or socially embedded) with each other in various ways.”⁶⁵ Social relationships in organized crime help generate capital, provide access to suppliers and potential accomplices, and facilitate and expedite a general criminal opportunity structure.⁶⁶ As with white-collar crime, moving to the top level of a drug trafficking cartel requires special skill in the form of social capital, analytical thinking, planning, and resourcefulness. Interestingly, Sutherland’s identification of white-collar crimes as originating from positions of privilege and requiring special skills can be equally definitive of cartel-level drug trafficking.

Third, the rational decision making theory of crime⁶⁷ is highly applicable to both white-collar crime and cartel-level street crime. While many necessity-based street criminals are less calculating about when and how to engage in criminal activity, members at the top of an organized crime syndicate or cartel engaging in drug trafficking are very strategic in committing offences, affording themselves the greatest amount of profit with the least amount of risk. One police study in Canada involving street gangs, narcotics, and proceeds of crime units reported that a majority of the cases encountered were related to organized crime, stressing that “many of the individuals

⁶³ PJ Carrington, *Co-offending in Canada, 2011* (Ottawa: Canadian Centre for Justice Statistics, 2011) at 3–5.

⁶⁴ Pierre Tremblay, “Searching for suitable co-offenders” in Ronald V Clarke & Marcus Felson (eds), *Routine activity and rational choice: Advances in criminological theory*, vol 5 (New Jersey: Transaction Publishers, 2004) at 17–34; Martin Bouchard, “A Capture-Recapture Model to Estimate the Size of Criminal Populations and the Risks of Detection in a Marijuana Cultivation Industry” (2007) 23:3 J Quant Crim 221 at 221–241; Martin Bouchard & Holly Nguyen, “Is it who you know, or how many that counts? Criminal Networks and Cost Avoidance in a Sample of Young Offenders” (2010) 27:1 J Quart 130 at 130–58.

⁶⁵ Martin Bouchard & Carlo Morselli “Opportunity structures of organized crime” in Letizia Paoli (ed), *The Oxford Handbook of Organized Crime* (Oxford: Oxford University Press, 2014) at 297.

⁶⁶ Tremblay, *supra* note 64 at 17; Carlo Morselli, *Inside criminal networks* (New York: Springer, 2009) at 2.

⁶⁷ Richard Cloward & Lloyd Ohlin, *Delinquency and Opportunity: A Theory of Delinquent Gangs* (New York: Taylor and Francis, 1960).

[dealt] with were implicated in [organized crime] groups doing their ‘dirty-work.’”⁶⁸ To this end, an RCMP officer in British Columbia stated that “organized criminals often operate like a business, they are calculated, they start stocking things away, and they have justifications for the money they make.”⁶⁹ Another officer remarked “they are insulated from certain types of crimes as they have individuals working for them.”⁷⁰ Cartel-level drug traffickers operate like white-collar criminals in a business, using special skills and risk-averse tactics to maximize their protection and profitability.

One such tactic involves the use of lower-level members. Through their strategic hierarchal structure, high-level members of drug trafficking cartels are able to effectively guard themselves from prosecution, using lower-level members as shields to avoid criminal charges. Many investigators realize that large-scale drug traffickers especially those in organized cartels use third parties to avoid being caught.⁷¹ These trafficking organizations generally form chains in which most of the money moves up to the supplier, while the narcotics flow out to the users through a series of conduits.⁷² Because of this, where possible, the RCMP rarely apply criminal organization laws, instead laying conspiracy charges when there is sufficient evidence.⁷³ Conspiracy laws allow the police to charge offenders who play key leadership roles, despite the fact that they avoid committing overt criminal acts,⁷⁴ allowing the police to “be proactive and arrest suspects before they commit [offences].”⁷⁵ Members at the bottom of the organization, however, are more similar to street criminals: the actions they take are more public, they are subjected to police charges, and “they sell drugs ... but they are not organized criminals.”⁷⁶ Generally, these lower-level members end up facing prosecution in the place of the higher-level members. Due to the specific hierarchical structure and calculating nature of cartels, the way cartel-level drug trafficking is regulated should more closely mirror that of white-collar crime. In that regard, an immunity program may be appropriate in combatting cartel-level drug trafficking.

Comparing Enforcement Tools

The Competition Bureau’s Immunity Program

⁶⁸ Public Safety Canada, *Proportion of Criminal Incidents Associated with Organized Crime*, 2015–R023 (Ottawa: Public Safety Canada, 2015) at 32 [PSC, “Criminal Incidents Associated with Organized Crime”].

⁶⁹ *Ibid* at 40.

⁷⁰ *Ibid* at 41.

⁷¹ Frederick J Desroches, “The Use of Organized Crime and Conspiracy Laws in the Investigation and Prosecution of Criminal Organizations” (2013) 7:4 Policing 1 at 7.

⁷² Public Safety Canada, *Organized Crime Research Highlights*, H001 (Ottawa: Public Safety Canada, 2015) at 5–7 [PSC, “H001”].

⁷³ Desroches, *supra* note 71 at 7.

⁷⁴ PSC, “H001”, *supra* note 72 at 5–7.

⁷⁵ Desroches, *supra* note 71 at 8.

⁷⁶ PSC, “Criminal Incidents Associated with Organized Crime”, *supra* note 68 at 41.

In the following section, I will compare the use of plea bargaining and informer privilege in combatting cartel-level drug trafficking to the use of the Immunity Program in combatting white-collar crime. I conclude that an immunity program would be appropriate in the context of cartel-level drug trafficking because current enforcement tools are not effective in achieving deterrence.

The basic steps of the Competition Bureau's Immunity Program were outlined by the Ontario Superior Court in *R v Nestlé Canada Inc.*⁷⁷ Under the program, a party may make a limited hypothetical disclosure of a violation of the *Act*. If that party is the first party to approach the Competition Bureau about the violation, they will receive a "marker" confirming their position as the first to come forward. The party will then disclose—still in hypothetical terms—a detailed description of the illegal activity. This is known as a "proffer." The Competition Bureau then recommends that the Director of Public Prosecutions (DPP) grant immunity to the party that has offered this information. Instances in which immunity will not be granted are generally restricted only to those situations where the Competition Bureau needs more information in order to investigate the alleged offence.⁷⁸ Immunity would not be based on the merits or egregiousness of a violation being reported.⁷⁹ As long as the perpetrator/confessor is the first to disclose the unknown activities, it is likely that he or she will receive immunity for conduct related to those activities.⁸⁰

Overall, the program has successfully met the Competition Bureau's policy objectives.⁸¹ Indeed, a court has recognized that the program is tailor-made for its purposes: cartel activities directed at price-fixing, and similar anti-competitive conduct, that can ordinarily only be discovered and prosecuted if a party to the cartel comes forward and reveals both the existence of the cartel and the parties to it.⁸² Although the program does not achieve deterrence through penalization, it requires specific deterrence (i.e., that the offenders cease their anti-competitive activities) and encourages both general deterrence and discovery of future crimes. The benefits to society derived from co-operation and disclosure under an immunity program generally outweigh the public interest in punishing the cartel.⁸³ In fact, the Competition Bureau has called the Immunity Program the "single most powerful means of detecting criminal activity [and] its contribution to effective enforcement is unmatched."⁸⁴

⁷⁷ *R v Nestlé Canada Inc.*, 2015 ONSC 810 at para 6 [*Nestlé*].

⁷⁸ *Ibid* at 810 at paras 22–27.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ See e.g. *R v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117; *Nestlé*, *supra* note 77 at para 6. In these cases, the Immunity Program effectively invoked disclosure and deterrence through further prosecution.

⁸² *Nestlé*, *supra* note 77 at para 22.

⁸³ OECD, *Leniency for Subsequent Applicants*, Policy Roundtables (2012) at 11.

⁸⁴ Competition Bureau, "Immunity Program", *supra* note 46 at Preface.

The unyielding result is that white-collar criminals (i.e., those in violation of the *Act*) are afforded a clear, concise mechanism to unveil their crimes and receive reciprocity—an exchange for mutual benefit—by avoiding penalization. The program provides a strong incentive for offenders to come forward and admit to their crimes, while also providing clear penalties for the purpose of deterrence. Where information and co-operation is of such value that it is clearly in the public interest not to hold a person accountable for criminal activity⁸⁵, immunity programs generally offer enforcement authorities a superior tool to plea bargaining and informer privilege.

The Lack Of Reciprocity Available For Criminal Code Offenses

Current enforcement tools used to combat cartel-level drug trafficking pale in comparison to the Immunity Program. Violations of *Code* provisions rely on plea bargaining and informer privilege⁸⁶, both of which are insufficient to address the unique challenges of organized drug trafficking. In the following section, I will describe the shortcomings of plea bargaining and informer privilege in the context of organized drug trafficking. I conclude that they are largely ineffective, and given the proven effectiveness of the Immunity Program in the context of the *Act*, a similar program should be adopted in the criminal context.

Plea Bargaining

In the context of criminal proceedings, plea bargaining has been an established practice in most Canadian jurisdictions since 1975⁸⁷ and, today, about ninety per cent of criminal cases in the Canada and the US are resolved through the acceptance of guilty pleas.⁸⁸ The ability to bargain arises from Section 606(1) of the *Code*⁸⁹ and the Crown's discretionary powers, particularly in charging.⁹⁰

In essence, bargaining is used to exchange an accused's admission to crimes for the courts' leniency in the penalization of those crimes. The prosecutor and defence counsel can engage in a broad range of approaches including simple discussions, negotiations, and concrete agreements in an attempt to have the accused "plead guilty in

⁸⁵ Public Prosecution Service of Canada, "Deskbook", *supra* note 10 at Part III: Procedural Issues and Trial Practice - 3.3 Immunity Agreements.

⁸⁶ *Ibid.* See also *R v Burlingham* (1995), 97 CCC (3d) 385, at para 400 (SCC); Simon N Verdun-Jones & Adamira A Tijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform* (Ottawa, Policy Centre for Victim issues, 2002) at 19;

⁸⁷ Law Reform Commission of Canada, *Working Paper No 15: Criminal Procedure – Control of the Process*, (Ottawa: Department of Justice, 1975) at 39–60.

⁸⁸ S Cohen & A Doob, "Public Attitudes to Plea Bargaining" (1990) 32:1 Crim LQ at 85; Verdun-Jones & Tijerino, *supra* note 86 at vi.

⁸⁹ *Criminal Code*, *supra* note 8, s 606(1).

⁹⁰ See Don Stuart, Tim Quigley & Ronald Joseph Delisle, *Learning Canadian Criminal Procedure*, 11th ed (Toronto: Irwin Law Inc, 2006) at 746. The Crown can reduce the number or seriousness of the charges, proceed by summary conviction rather than indictment on hybrid offenses, and make recommendations as to sentencing.

return for the prosecutor's agreeing to take or refrain from taking a particular course of action."⁹¹ These discussions are generally contained under the umbrella term of plea bargaining.

When comparing the process of plea bargaining to immunity programs, plea bargaining is ineffective at achieving deterrence of cartel-level drug trafficking. This is because (1) plea bargaining is a post-charge event and therefore does nothing to ensure specific deterrence⁹² and (2) it offers no guaranteed penalty to the accused, thereby decreasing its effectiveness.⁹³

Plea bargaining is primarily problematic because it may result in disproportionate penalties at the cost of rehabilitation.⁹⁴ Since charges have already been laid, a guilty plea may originate from a tactical, procedural decision to reduce a sentence, rather than an actual attempt at rehabilitation.⁹⁵ Indeed, it is easy to understand how offenders are vulnerable to confessing to crimes they did not commit in order to minimize their penalties.⁹⁶ This result does not meet the goals of rehabilitation if an innocent person is serving a sentence for a crime not committed;⁹⁷ similarly, an accused may be serving a sentence disproportionate to the wrongdoing committed.⁹⁸ In both cases, rehabilitation does not occur for the individual, and where rehabilitation does not occur for an otherwise guilty person, he will not be deterred from future wrongdoing.⁹⁹ In that case, specific deterrence is not achieved.¹⁰⁰

The second concern with plea bargaining is that it provides little certainty of an outcome to an offender when the plea is made. Since the determination of a sentence varies based on the severity of a crime, the severity of the offender's conduct,¹⁰¹ and the

⁹¹ Cohen, *supra* note 88.

⁹² Crown Policy Manual, *supra* note 85 at 1.

⁹³ *Ibid.*

⁹⁴ Canada, Department of Justice, *Plea Bargaining*, by Milica Potrebic Piccinato (Ottawa: Government of Canada, 2004) at 5–7 [Piccinato]. In Canada, the goal of plea bargaining is also stated as promoting “the benefits that flow to the administration of justice from early guilty pleas”, namely, the saving of judicial resources.

⁹⁵ Albert J Alschuler, “The Changing Plea Bargaining Debate” (1981) 69:3 Cal L Rev 652 at 657.

⁹⁶ Piccinato, *supra* note 95 at 6; See also *R v Meadus*, 2014 ONCA 445 at paras 16–17; *R v Tryon*, [1994] OJ No 332 (CA) at para 1.

⁹⁷ See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001) at 111–113; Malcolm M Feeley & Jonathan Simon, “The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications” (1992) 30:1 *Criminology* 449–474 at 451–452 for discussions of the need for the admission of guilt for proper rehabilitation and deterrence.

⁹⁸ *Criminal Code*, *supra* note 8, s 718.1.

⁹⁹ Joan Petersilia, “Beyond the Prison Bubble” (2011) 268 National Institute of Justice 26 at 29.

¹⁰⁰ See Rocksheng Zhong et al, “So You’re Sorry? The Role of Remorse in Criminal Law” (2014) 42:1 J American Academy Psychiatry L 39 at 42–43. If an accused does not truly recognize his wrongdoing but simply pleads guilty to minimize his sentence, rehabilitation and thereby specific deterrence is not guaranteed.

¹⁰¹ *Criminal Code*, *supra* note 8, s 718.1.

discretion of the judge, it is difficult to predict what sentence one would receive if the offender entered a plea at the time of being charged.¹⁰² As a result, there is the possibility that an accused could be induced to plead guilty for a reduced sentence.¹⁰³ Accordingly, it may even be the case that an accused could be encouraged to plead guilty to a crime that he or she did not commit, for fear of receiving a harsher penalty if ultimately convicted after a trial.¹⁰⁴

To combat these issues with plea bargaining, there must be a pre-charge program under which offenders are able to come forward and admit to their crimes in exchange for reciprocity. Establishing such a structure, that would allow an offender to admit guilt prior to ever being charged, would be a valuable mode of specific deterrence and a powerful indicator of that offender's attempt to rehabilitate, and this would ultimately meet the goals of our system. At that stage, reducing the offender's punishment in exchange for her or his admission of guilt—or perhaps even granting immunity altogether in the form of a stay of charges (to ensure she or he does not re-offend)—would be an invaluable method of deterrence.

Informer Privilege

In addition to plea bargaining, individuals that have been charged or involved with offenses under the *Code* may be able to rely on the process of informer privilege. This allows the accused to exchange valuable information for privileges such as protection and reduced sentencing. Informer privilege exists to “promote the giving of assistance to the police by citizens in the investigation and prevention of crime” and to protect informers from possible retribution.¹⁰⁵ The SCC has labeled this privilege “an ancient and hallowed protection”¹⁰⁶ that is vital to law enforcement.¹⁰⁷ The privileged status of informants is necessary because of “the risk of retribution from those involved in crime.”¹⁰⁸ As such, once a judge is satisfied that an offender should receive such privilege, a complete and total bar on any disclosure of the informer's identity will apply.¹⁰⁹

¹⁰² Morselli et al, "Predicting Sentencing Outcomes With Centrality Measures" (2013) 2:4 Security Informatics at 2.

¹⁰³ Piccinato, *supra* note 95; Douglas D Guidorizzi, “Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics” (1998) 37:1 Emory LJ 753 at 768; See also *Criminal Code*, *supra* note 8, ss 606(1), 607(1).

¹⁰⁴ Piccinato, *supra* note 95 at 6; Guidorizzi, *supra* note 103 at 768.

¹⁰⁵ *R v X and Y*, 2012 BCSC 327 at paras 18–19.

¹⁰⁶ *Leipert*, *supra* note 26.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Named Person v Vancouver Sun*, 2007 SCC 43 at para 30.

The PPSC recognizes the public's interest in holding people accountable for their crimes.¹¹⁰ However, some crimes can only be proved through “the testimony or co-operation of individuals who are implicated in the same crime or in some other criminal activity and who seek immunity from prosecution in exchange for their testimony and/or their co-operation with the police.”¹¹¹ Courts have recognized a legal basis of a power to grant immunity in circumstances where it would benefit the public interest.¹¹² In this way, the perpetrator of a street crime may be able to seek reciprocity through informer privilege.

The ability to receive this immunity, however, is governed by numerous restrictions. The PPSC Deskbook mandates that informer immunity should be granted sparingly and only exceptionally.¹¹³ Immunity can only be granted by the DPP through Crown counsel, and only in situations “that are covert or difficult to detect, [where the informant provides] full and candid disclosure of conduct before its detection.”¹¹⁴ Additionally, Crown counsel must consider numerous other criteria, including the seriousness of the offence and the reliability of the person,¹¹⁵ as well as the dangers in the process of converting the criminal to an informant.¹¹⁶ In short, while individuals can, theoretically, receive immunity through informer privilege, there are too many restrictions imposed on the accused to make it worthwhile for individuals to report criminal activity. This lies in stark contrast to the Competition Bureau's Immunity Program, which provides clear incentives for individuals to report white-collar crime.

As is the case with plea bargaining, a significant roadblock to the efficiency of this privilege is its unguaranteed status. For low-level cartel members who have trafficked drugs, a decision to rely on informer privilege requires admitting that they have trafficked drugs with no guarantee that they will be in a better situation than they were before. These offenders could face harsh penalties during sentencing for crimes that would have otherwise have remained undetected. Even worse, these offenders could be subjected to violence from the cartel with no protection offered in return if other members find out about their attempt to report criminal activity to law enforcement.

To combat these problems, a similar privilege, akin to the Immunity Program, should be altered and regulated so that it offers an optimal outcome to offenders. Most

¹¹⁰ Public Prosecution Service of Canada, “Deskbook”, *supra* note 10 at Part I: Procedural Issues and Trial Practice - 1.1 Relationship between the Attorney General and the Director of Public Prosecutions - 1.1.4 Guiding principles

¹¹¹ *Ibid* at Part III: Procedural Issues and Trial Practice - 3.3 Immunity Agreements.

¹¹² *R v Edward D* (1990), 73 OR (2d) 758 (CA); *Bourrée v Parsons* (1986), 29 CCC (3d) 126 (Ont Dist Ct); *R v Betesh* (1975), 30 CCC (2d) 233 (Ont Co Ct).

¹¹³ Public Prosecution Service of Canada, “Deskbook”, *supra* note 10 at Part V: Specific Types of Prosecutions.

¹¹⁴ *Ibid* at Part III: Procedural Issues and Trial Practice - 3.3 Immunity Agreements.

¹¹⁵ *Ibid*.

¹¹⁶ *R v Spence*, 2011 ONSC 2406; *R v Buric* (1996), 28 OR (3d) 737, *aff'd* [1997] 1 SCR 535.

offenders will not be willing to risk the potential consequences of informing the police about aspects of criminal organizations unless they are certain that they will receive the benefits of informer privilege—namely, safety in the form of both protection from the organization and lesser penal consequences. Effective enforcement should recognize that organized crimes involve individuals who re-offend out of practical necessity yet possess valuable information to law enforcement. By offering immunity to such offenders, the *Code* would achieve specific deterrence by offering those offenders an alternative to re-offending, as well as general deterrence of future crimes by use of those offenders' valuable information in enforcement.

CONCLUSION

To appropriately address the challenges of detecting and deterring cartel-level drug trafficking, an immunity program should be established. Current methods of law enforcement aimed at penalizing organized drug trafficking lack deterrent value. These methods do not reflect reality. On the one hand, the current system provides no incentive to low-level drug traffickers to disclose the crimes they have committed. Not only do they risk uncertain penalties from the justice system, but they often risk penalization from the criminal organizations as well. On the other hand, members at the top of criminal organizations and cartels are covert and calculating enough that they commit crimes opportunistically and through the employment of specialized knowledge. Those senior members are difficult to penalize, since they are insulated by lower-level members in their criminal organizations.

Given that the Competition Bureau's Immunity Program targets criminal activity that is characterized by a covert nature and that involves a network of individuals, we should look to it as a model for effective detection and deterrence of organized drug trafficking. More specifically, a program should be adopted for instances of drug trafficking where an offender's conduct is non-violent and where he or she fully co-operates by exchanging information about the other members of the cartel. Establishing an immunity program for cartel-level trafficking would have the immediate effect of excusing the criminality of a few low-level criminals, while having the underlying effect of enhancing deterrence and, potentially, dismantling extremely damaging criminal organizations.