

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE**RECEIVED / REÇU**

Date: December 12, 2024

CT- 2024-009

Badih Abboud for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

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December 12, 2024

BY E-FILINGCompetition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4**Attention: Badih Abboud, Senior Registry Officer**

Dear Mr. Abboud:

McKesson and Rexall (variation of CT-2016-016) – Notice of Application under s. 106(1)(b) of the *Competition Act* (CT-2024-009)

On behalf of McKesson Canada Corporation (“**McKesson Canada**”) and Rexall Pharmacy Group ULC (formerly Rexall Pharmacy Group Ltd.) (“**RPG**”) and with the consent of the Commissioner of Competition (the “**Commissioner**”), we write to provide further information to assist the Tribunal in its consideration of the consent application dated November 13, 2024. Steve Sansom, counsel to the Commissioner, has reviewed and consented to the submission of this letter.

As an initial point, while the issuance of the requested rescission order is a discretionary matter for the Tribunal, the parties note that the application to rescind the Consent Agreement between the Commissioner and McKesson Canada/RPG has been made pursuant to paragraph 106(1)(b) of the *Competition Act* (“**Act**”). That provision provides the Tribunal with jurisdiction to rescind or vary a consent agreement if the parties to the consent agreement (i.e., the Commissioner and McKesson Canada/RPG here) have consented to an alternative agreement or an alternative order. After a thorough review of McKesson Canada’s request to rescind the Consent Agreement, the Commissioner has consented to McKesson Canada’s application for an alternative order (i.e., an order of the Tribunal rescinding the Consent Agreement on completion of the Proposed Transaction, in accordance with paragraph 106(1)(b)).

For the reasons set out below, we respectfully submit that the Tribunal should exercise its discretion to grant such an alternative order. Upon completion of the sale of RPG to entities controlled by funds managed by Birch Hill Equity Partners Management Inc. (“**Birch Hill**” and such sale, the “**Proposed Transaction**”), there will be no basis for imposing any extraordinary restrictions above and beyond the general provisions of the *Act* on either (1) any potential re-acquisition by RPG or McKesson of the Divestiture Assets listed in Schedule B of the Consent Agreement or (2) any transfer of any Retail Confidential Information or Wholesale Confidential

Information between Birch Hill/RPG and McKesson.¹ Because the original rationale for the Consent Agreement will be lacking upon closing of the Proposed Transaction, the parties have recognized that the Consent Agreement should accordingly be rescinded effective upon closing of the Proposed Transaction.

1. If Birch Hill/RPG or McKesson Canada proposes to acquire one or more of the Divestiture Assets in Schedule B of the Consent Agreement during the period between the closing of the Proposed Transaction and the end of the 10-year period after the Divestiture, will Birch Hill/RPG or McKesson Canada be required to provide advance notice to the Commissioner of the proposed acquisition?

As an initial observation, any acquisition of any of the Divestiture Assets by either Birch Hill/RPG or McKesson at any time would be subject to review under the merger provisions in section 92 of the *Act* and potentially also be subject to the pre-merger notification requirements in Part IX of the *Act*.

Against that backdrop, following completion of McKesson Canada's sale of RPG to Birch Hill, there will no longer be any policy rationale to impose on McKesson Canada or RPG any prior notification or approval requirements for any hypothetical future acquisitions beyond the generally applicable provisions of the *Act*. The original rationale for imposing such extraordinary restrictions—namely McKesson Canada's 2016 acquisition of the healthcare businesses of the Katz Group, including Rexall, will—upon completion of the Proposed Transaction—no longer exist.

Furthermore, with respect to Birch Hill and RPG, any acquisition of Divestiture Assets (that are otherwise compliant with section 92 and Part IX) would restore Rexall to its position prior to McKesson Canada's acquisition of the healthcare businesses of the Katz Group and would not result in a structural change in the market that the Consent Agreement was intended to address.

Finally, McKesson Canada does not have any present intention to acquire any of the Divestiture Assets. Indeed, upon closing of the Proposed Transaction, McKesson Canada will provide to Birch Hill a usual and customary commitment not to acquire or otherwise invest in any retail pharmacies in any of the provinces in which Rexall operates for a period that extends beyond the remaining term of the Consent Agreement.

2. Does the Proposed Transaction contemplate the transfer of any Retail Confidential Information or Wholesale Confidential Information between Birch Hill/RPG and McKesson Canada (directly or indirectly)? Relatedly, will Birch Hill/RPG or McKesson Canada be required to notify the Commissioner of any such proposed transfer during the period between the closing of the Proposed Transaction and the end of the 10-year period after the Divestiture?

Following completion of the Proposed Transaction, Retail Confidential Information and Wholesale Confidential Information will be exchanged between McKesson Canada and Birch Hill/RPG pursuant to arm's length commercial agreements. For example, McKesson Canada will continue to serve as the primary distributor to the Rexall business and in connection with such operations will require order volumes and various other information from Rexall

¹ Capitalized terms not otherwise defined herein have the meanings as defined in the Consent Agreement between the Commissioner, McKesson Canada and RPG registered with the Tribunal on December 14, 2016.

pharmacies. Such information is Retail Confidential Information under the Consent Agreement. Conversely, McKesson Canada may be required to disclose to Rexall information about, for example, shortages of products that Rexall has ordered. Such information is Wholesale Confidential Information under the Consent Agreement. McKesson Canada and Birch Hill/RPG will not be required to notify the Commissioner of any such exchanges. Indeed, subject to certain exceptions specified therein, paragraph 30(e) of the Consent Agreement expressly permits the exchange of the types of Retail Confidential Information and Wholesale Confidential Information that was provided, disclosed or otherwise made available between McKesson Canada and Rexall pursuant to their distribution prior to McKesson's 2016 acquisition of Rexall, and the parties are not required to notify the Commissioner of exchanges of Retail Confidential Information or Wholesale Confidential Information that take place pursuant to paragraph 30(e).

That result is not offensive to the *Act*. Indeed, the relationship between McKesson Canada and Birch Hill/RPG after the closing of the Proposed Transaction will be no different than other typical relationships between wholesale suppliers and their third party retail customers. This relationship will also be consistent with the distribution relationship between McKesson Canada and Rexall that existed prior to McKesson Canada's 2016 acquisition of Rexall.

The future commercial relationship between McKesson Canada and Birch Hill/RPG will be governed by vigorously negotiated arms-length commercial agreements. As independent companies, McKesson Canada and Birch Hill/RPG will each have both independent incentives and the ability to prevent the other party from misusing Retail Confidential Information or Wholesale Confidential Information, as applicable. For example, the commercial agreements between McKesson Canada and Birch Hill/RPG contain typical confidentiality clauses requiring information disclosed by one party to the other to be maintained confidentially and used only in connection with permitted purposes.

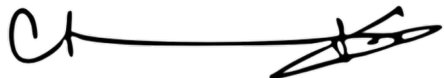
Similarly, McKesson's commercial agreements with its other wholesale customers contain confidentiality restrictions that restrict McKesson Canada from sharing their confidential information with Rexall or other wholesale customers of McKesson Canada. Importantly, the general provisions of the *Act*, including sections 45 and 90.1, will apply.

Finally, McKesson Canada will no longer have any of the incentives that arose as a result of the 2016 Katz Group transaction and animated the Consent Agreement. The foundational basis for the Consent Agreement firewalls is the Commissioner's concern, arising from the Katz Group transaction, that McKesson Canada's affiliation with Rexall would incentivize McKesson Canada to (i) favour Rexall over its other wholesale customers and (ii) seek a coordinated outcome at retail. In each case, McKesson Canada's ownership of Rexall—and its receipt of the retail margin earned by Rexall—is a necessary condition for these asserted incentives to exist. However, after the closing of the Proposed Transaction, McKesson Canada will no longer have any such incentives. To the contrary, McKesson Canada will be *disincentivized* to seek a coordinated outcome at retail, because higher retail prices resulting from such an outcome would result in lower retail sales volumes, meaning lower wholesale sales to retail pharmacies by McKesson Canada.

Simply put, because the incentives that animated the Consent Agreement will no longer exist upon closing of the Proposed Transaction, there will be no basis under the *Act* for imposing extraordinary restrictions on access to and exchanges of Retail Confidential Information and Wholesale Confidential Information beyond the generally applicable provisions of the *Act*.

We trust the above will assist the Tribunal in its consideration of the application, and would be pleased to provide any further information that the Tribunal may require.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'C. Sethi', with a long horizontal stroke extending to the right and a stylized flourish at the end.

Chanakya A. Sethi
Counsel to McKesson Canada and RPG

cc Jim Dinning, *Davies Ward Phillips & Vineberg LLP*
Steve Sansom, *Counsel to the Commissioner*