

COMPETITION LAW BULLETIN

October 11, 2007

A CLEARER, LESS AMBIGUOUS IMMUNITY PROGRAM IN CANADA

On October 10, 2007, the Competition Bureau published a new Bulletin, together with explanatory responses to Frequently Asked Questions, regarding its Immunity Program under the *Competition Act*. The new Bulletin replaces the Immunity Bulletin that has been in effect since September 2000. Significant improvements have been made to the Bureau's Immunity Program, particularly for potential immunity applicants and their counsel in cases which have a foreign element and where coordinated multi-jurisdictional immunity applications are required.

Improvements to the Immunity Program include:

- Greater alignment with programs in other jurisdictions, particularly the U.S. and E.U.
- Improved confidentiality protections for applicants
- Clearer rules on the relationship between corporate applicants and their employees who may be implicated in an offence
- A new standard for disqualifying applicants from the program
- Expanded guidance on application procedures

The new Bulletin enhances clarity and predictability in the administration of the Immunity Program, but it also emphasizes that applicants for immunity have a time-limited and demanding course to follow if they are to obtain and maintain a grant of immunity from prosecution in Canada.

IMPROVED INTERNATIONAL CONVERGENCE

A number of eligibility criteria and disclosure obligations in the original Canadian Immunity Program differed considerably from those in foreign programs, and generated delay and uncertainty for parties involved in international cartel cases. These differences included the ineligibility of the "instigator, leader or sole Canadian beneficiary" of a cartel, disclosure requirements that were ambiguous and overly broad, risks of revocation of immunity that were uncertain, and confidentiality requirements that created potential conflicts with Sarbanes Oxley and other foreign regimes. The new program is much better aligned in many respects with requirements in other jurisdictions.

NEW STANDARD FOR DISQUALIFICATION

The new Bulletin replaces the former subjective criteria of disqualifying the leader or instigator of a cartel with a new and objective standard: Did the immunity applicant coerce other parties to participate? Uncertainty over subjective issues like the "leadership" of a multi-party conspiracy are put to rest by adopting the more objective coercion standard, which in practice is used internationally. There are, however, a few problems with the new standard. First, the meaning of coercion may be unclear, particularly where a cartel is led by a dominant participant. Second, it is possible that a party, particularly a dominant firm in a concentrated industry, could instigate and run a cartel without "coercing" other parties to participate. As a policy matter it is undesirable to allow the party that instigated a cartel to pre-empt the other participants in a race for immunity. Despite these problems, the coercion standard may be the best alternative.

IMPROVED CONFIDENTIALITY PROTECTIONS

The new Bulletin continues to guarantee the confidentiality of an immunity applicant's identity, but it seeks a better balance between the importance of protecting an applicant's identity, particularly during the early stages of an investigation, and the need to ensure adequate investigatory freedom for the Bureau, particularly as an investigation matures. The Bulletin introduces new specific exceptions to the general confidentiality commitment, including where disclosure is necessary to obtain judicial authorization for a warrant or other compulsory investigative power. The new exceptions provide applicants with clear notice of the rules, and remove a restraint that had previously tied the Bureau's hands in at least one important investigation. However, the scope and application of these exceptions will require careful consideration as practice emerges. In a confidence-boosting commitment, the Bulletin also makes it clear that the Bureau will not supply information in a civil proceeding without a Court order, and that it will take measures to oppose or limit the scope of such an order.

The Bulletin imposes corresponding confidentiality obligations on the immunity applicant in order to avoid premature disclosure of an investigation. The prior program was unnecessarily rigid and inflexible in this respect, but the new Bulletin recognizes that an applicant may be required by law in another jurisdiction to disclose a grant of immunity, and provides a procedure for balancing investigative requirements with other legal obligations of the applicant.

REVOCAION OF IMMUNITY

The Bulletin re-emphasizes the critical criteria for revocation of immunity once granted, and introduces new safeguards for parties facing revocation. Essentially, immunity will only be revoked as a result of deliberate non-cooperation. Revocation as a result of non-disclosure of other offences has been restricted to competition offences, and will apply only if there has been an intentional effort to mislead the Bureau. Before revoking immunity, the Director of Public Prosecutions will provide an applicant with 14 days written notice, allowing the applicant an opportunity to correct the non-cooperation. If immunity is revoked, the revocation will only affect non-cooperating parties: for example, if the immunity of a business is revoked, its cooperating employees will retain their immunity.

CHANGES TO APPLICATION PROCEDURES

The Bulletin continues to promote early immunity applications, maintaining the concept that immunity is granted only to the first party to apply, but also introduces several important changes to the process of seeking immunity. The Bureau appears more flexible in the Bulletin's treatment of the "marker" and "proffer" procedures. Those procedures facilitate early applications by authorizing oral reporting and guaranteeing a party's first-in status while it continues to conduct its internal investigation and report the findings. Other procedural changes may be more contentious, including an expectation that individual witnesses may be required to provide evidence prior to confirmation of their immunity. However, in an important move, the current provisional stage in the immunity process is being dropped. Applications will now proceed directly from the marker stage to a final immunity agreement with the Director of Public Prosecutions. This streamlined approach should minimize risks to the credibility of the immunized party and its witnesses, but the Bureau will need to exercise considerable vigilance to ensure that a party with full immunity continues to cooperate with the degree of diligence that these cases require.

Another significant improvement is in the more detailed list, provided in the FAQs, of the information to be included in a proffer. The new list is much more precise and complete than the prior guidance on evidence to be supplied in an immunity application. This list will be particularly helpful in managing the expectations of applicants and foreign legal advisors regarding the evidentiary obligations they face. However, the apparent expectation that all this information can be provided within 30 days of receipt of a marker remains a concern. Moreover, it is clear from the FAQs that the Bureau will not accept the demands of another competition agency as an excuse for delay in Canada. It is to be hoped that the corollary will be better coordination of the competing demands on an immunity applicant by different agencies, but textually, at least, there is a risk of an applicant being pulled in at least two directions simultaneously, while perfecting a marker.

Finally, an important innovation is the provision of standard or template corporate and individual immunity agreements and witness protection letters. Like the other improvements in predictability, this addition will give parties considering an immunity application an advance understanding of the requirements and expectations of the Immunity Program.

CONCLUSION

The Competition Bureau’s new immunity program represents a substantial step forward in clarity and predictability. It shows a willingness by the Bureau to accommodate the legitimate interests of immunity applicants, as well as a determination not to have Canadian investigative objectives held hostage to those interests. On its face, the Bulletin is more clearly in line with international standards of immunity and leniency in competition cases, particularly in jurisdictions that are critical to Canadian economic activity, including the United States, the European Union and the United Kingdom. It is an important development for parties in Canada and abroad that may have exposure to a Canadian criminal investigation for anti-competitive conduct.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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