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Canada's Immunity Program

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I. Introduction

In September, 2000, Canada's Competition Bureau ("the Bureau") released an Information Bulletin (the "Bulletin") setting out the terms of Canada's Immunity Program for criminal offences in relation to competition. The Immunity Program formalizes the procedure that has been in existence in Canada since 1991 and provides clarification regarding the conditions and requirements for obtaining immunity. The Bulletin sets out the conditions under which the Bureau may recommend a grant of immunity from prosecution to a party to an offence under the *Competition Act*. This paper provides an overview of the Immunity Program and discusses the practical steps and considerations involved in making an immunity application.

II. The Competition Act

The *Competition Act* (the "Act") codifies the basic principles for the conduct of business in Canada with the goal of ensuring a fair and competitive marketplace. The Act, which contains both criminal and civil provisions, is administered by the Commissioner of Competition (the "Commissioner") who is the head of the Bureau. Part VI of the Act sets out criminal offences in relation to competition, including conspiracies that unduly lessen competition (i.e. price fixing or market allocation), bid rigging, price maintenance and certain deceptive marketing practices, all of which are punishable by fines and/or imprisonment. The Bureau investigates criminal conduct which is enforced in the courts by the Attorney-General of Canada (the "Attorney-General") through the Canadian Department of Justice (the "DOJ"). The Immunity Program operates to provide qualified parties immunity from prosecution for these offences.

The Immunity Program is one of the most important tools available to the Competition Bureau and the DOJ to detect and deter criminal anti-competitive conduct. It encourages applicants to disclose evidence of anti-competitive conduct, such as international price fixing or market allocation cartels, at the earliest possible stage; activity that may otherwise be difficult, if not impossible, to detect through conventional investigative techniques. In this manner, it aids enforcement of competition laws, promotes compliance by Canadian and international industry participants and saves enforcement agencies time and resources.

For Immunity Program applicants, it provides the security of immunity from prosecution for both the business entity and, in most cases, its present and former directors, officers and employees, saving the company and individuals from the adverse publicity and reputational damage of a criminal investigation and trial, potentially debilitating fines, and for individuals, imprisonment.

The Immunity Program, and others like it around the world, have been credited with overwhelming success in anti-cartel enforcement, leading to a surge in criminal proceedings and pleas, and in Canada, civil damage actions through the use of section 36 of the Act.

III. Overview of the Immunity Program

The Bulletin outlines the policy and procedures involved in obtaining a grant of immunity from prosecution for criminal offences under the Act. The following is a brief summary of the key provisions of the Immunity Program and its effect on immunity applicants.²

A. Role of the Attorney-General of Canada and the Commissioner of Competition

The sole authority to grant immunity to a party implicated in an offence under the Act lies with the Attorney-General of Canada through the DOJ. The role of the Bureau is to investigate potential violations under the Act. Where there is evidence of criminal conduct, such as a price fixing or market allocation agreement, the Commissioner may then make a recommendation to the Attorney-General as to whether immunity should be granted. Upon receiving the Commissioner's recommendation, the Attorney-General then considers whether it is in the public interest to grant such immunity.

B. Conditions for Grant of Immunity

Subject to conditions outlined in the Bulletin, there are two situations where the Bureau may recommend that immunity be granted:

² Competition Bureau Information Bulletin: Immunity Program under the Competition Act (September, 2000) (the "Bulletin").

- (a) where the Bureau is unaware of an offence in relation to a particular product or service and the party is the first to disclose it; and
- (b) where the Bureau is aware of an offence and the party is the first to come forward, before there is sufficient evidence to warrant a referral of the matter to the Attorney-General.³

Before a recommendation will be made, however, the Bureau must be satisfied that the applicant has met, or is prepared to meet, the following conditions:

- (a) The applicant must have ceased its participation in the illegal activity.
- (b) The applicant cannot be the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada. It is important to note, however, that corporations or persons who were “co-leaders” or “co-instigators” of the illegal activity may still be eligible for immunity.⁴
- (c) During the Bureau’s investigation and subsequent prosecutions, the party must provide complete and timely co-operation, including:
 - (i) The applicant must reveal all competition related offences with respect to a particular product or service in which it may have been involved.⁵ This includes the timely disclosure of any obstruction activities that may be revealed as a result of an applicant's internal investigation.
 - (ii) The applicant must provide full, frank and truthful disclosure of all evidence and information within its possession or control, wherever located, relating to the offences. There must be no misrepresentation of any material facts and any such misrepresentations which have occurred in the past must be fully and promptly disclosed;

³ *Bulletin, ibid.* at 3.

⁴ *Immunity Program - Frequently Asked Questions*, Section A.

⁵ *Immunity Program - Frequently Asked Questions*, Section B.

- (iii) The applicant must provide full and continuing cooperation. Where the immunity applicant is a business, it must take all lawful measures at its own expense to ensure that all current and former affiliates, directors, officers and employees co-operate throughout all stages of the investigation. Provided such directors, officers and employees admit their involvement as part of the corporate admission and provide complete and timely cooperation, they will qualify for the recommendation for immunity as well; and
- (iv) Where possible, the applicant must make restitution for the illegal activity. In practice, with the availability of civil damage actions, the restitution requirement for price fixing and market allocation conspiracies is a difficult factor to evaluate and has not been strictly applied.

If all of these conditions are satisfied, the Bureau may recommend to the Attorney-General that immunity be granted or, where full immunity may not be available, the Bureau may recommend other forms of leniency. For example, an applicant's cooperation may still be considered as a mitigating factor in any plea arrangement negotiations or subsequent proceedings or in conjunction with immunity for disclosing illegal conduct with respect to another product or service (as discussed below). It is important to note, however, that immunity may be lost at any point in the process where the applicant has not met the above requirements. In such a case, immunity may still be recommended for a second applicant who does meet all of the requirements.

C. Steps to an Immunity Application

The formal immunity process is divided into four main steps as outlined in the Bulletin⁶.

1. Step One - “First In”

The first step is initial contact with Canadian authorities. Anyone may discuss and/or request immunity by contacting the Deputy Commissioner of Competition, Criminal Matters, or the

⁶ *Bulletin, supra*, note 1 at 4.

Deputy Commissioner of Competition, Fair Business Practices. In the past, the initial contact with the Canadian authorities was often with the DOJ. Recently, the Bureau has made it clear that the initial contact should be with it, and specifically, with the Assistant Deputy Commissioner of Competition, Criminal Matters.

The cornerstone of the Immunity Program is its “first-in” policy whereby the first qualified party to make contact with Canadian authorities (and who subsequently meets all of its cooperation requirements) will be the sole party who receives full immunity. Consequently, an applicant should always consider making an application for immunity as early as possible.

In practice, it has developed that the initial contact generally takes the form of an anonymous inquiry by a party’s legal counsel as to whether immunity (first-in status) would be available in respect of a particular product or industry. Assuming a favourable response, counsel may then seek an immunity "marker" reserving the applicant's place at the head of the line while more information is obtained. This is consistent with the practice followed in the United States.⁷

2. Step Two - Provisional Guarantee of Immunity

The second step is to obtain a provisional guarantee of immunity (“PGI”). The PGI normally covers all current and former directors, officers and employees and is granted on the condition that the applicant continue timely disclosure of all relevant information to the Bureau and DOJ and continue to meet all of the other requirements of the program.

To obtain a PGI, the applicant must describe the illegal activity, usually on the basis of a hypothetical proffer by an applicant's legal counsel to the Bureau and the DOJ. A proffer must provide adequately detailed information about the key elements of the offence in order to permit the Attorney General to satisfy himself that an offence has been committed and that the applicant was not the instigator or the sole beneficiary of the conduct in Canada. This ensures that the

⁷ See remarks of Scott D. Hammond regarding the U.S. procedure, “*When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag On An Individual’s Freedom?*” (March 8, 2001) at 4: “The use of the marker system underscores the importance of companies coming forward as soon as possible after detection of the offense. While the company has a marker, no other company will be permitted to jump over the amnesty applicant at the front of the line, even one prepared to perfect its amnesty application immediately. If the company holding the marker fails to perfect its application within the allotted time frame, it will lose its place in line and other companies will then be considered for amnesty in the order in which they came forward.”

authorities can consider whether they have adequate information to recommend provisional immunity while also protecting an applicant's immunity position.

At this stage in the process, there may be some tension between the program's cornerstone of encouraging applicants to come forward "as soon as they believe they are implicated in an offence"⁸ and the requirement of providing adequate information for the Bureau and DOJ to determine whether a provisional guarantee of immunity ought to be granted. In the case of a price fixing or market allocation conspiracy for example, it may be difficult or impossible for one party to provide information to establish all elements of the offence, especially its effect on competition in the Canadian market (because of the "undueness" requirement in Canada's conspiracy provision). Disclosing such information is very difficult at the earliest stage of detection since it may not be determined without an extensive internal investigation by competition counsel.

3. Step Three - Full Disclosure

The third step involves negotiating an offer of immunity that is premised on full disclosure of all relevant information to the Bureau in exchange for a guarantee that the Bureau will not use the information against the applicant, unless the party breaches its obligations.

Full disclosure is an onerous obligation, consisting of an exhaustive internal investigation and search for information that is relevant to the activity. Such cooperation usually consists of numerous interviews of current and former directors, officers and employees and an exhaustive search for and production of relevant documents and records. The formal offer of immunity will establish the key terms and conditions upon which the grant will be dependant. Generally, the offer states that it is without prejudice to the applicant in the event that immunity is not granted and that the offer will be maintained in confidence.

During this stage, immunity applicants have an obligation to cooperate fully and to disclose all information related to *Competition Act* offences with respect to the relevant product or service. This includes an obligation to use reasonable, lawful measures to encourage compliance by all current and former officers, directors, employees and affiliates. This may include paying for

⁸ *Bulletin, supra*, page 3.

independent legal counsel for individuals or taking disciplinary action against individuals who refuse to cooperate.

4. Step Four - The Immunity Agreement

The fourth and final step is the execution of an immunity agreement. Following recommendation by the Bureau and independent review, the Attorney-General may, within his discretion, accept the recommendation and execute an immunity agreement that incorporates all continuing obligations. The immunity agreement is generally not completed until the Bureau's investigation of the alleged offence has been concluded.

D. Revocation of Immunity

If a party fails to comply with any of the requirements of the immunity agreement, immunity may be revoked. The Bureau may resume investigation of any party that does not meet its obligations pursuant to the agreement and will consider referring the matter to the Attorney-General with the recommendation that the grant of immunity be revoked. Furthermore, action may then be taken against the party with regard to the illegal activity. The same holds true for a corporation that does not fully promote the complete and timely cooperation of its employees, as well as an applicant that does not disclose any or all competition related offences or does not provide full, frank and truthful disclosure of all evidence and information known or available to it.

In this respect, any obstruction activity must be strongly discouraged and, if detected, must be immediately reported to the authorities so as not to jeopardize the grant of immunity.

IV. Immunity Plus - Where a Party is Not "First In"

The "Immunity Program - Frequently Asked Questions" (the "FAQ")⁹, a supplement published by the Bureau, outlines the Bureau's Immunity Plus policy (analogous to U.S. Amnesty Plus). Under Immunity Plus, where a party is not "first in", that party may still obtain a reduced penalty

⁹ Available on the Competition Bureau website at <http://strategis.ic.gc.ca>.

if it is the first to disclose an occurrence of a second offence related to another product or service of which the Bureau was not originally aware. In this instance, the party will be eligible for full immunity for the second offence, as well as a favourable sentencing recommendation with respect to the punishment for the original offence, provided the party pleads guilty to the original offence.

V. Joint Requests for Immunity

It is important to note that that the Bureau and the Attorney-General will not consider joint requests for immunity. Allowing a party to wait for, and co-ordinate with, a co-conspirator before contacting the Bureau would presumably undermine the rationale for, and effectiveness of, the Immunity Program.

VI. Transnational Criminal Anti-Competitive Activity

In situations where the criminal anti-competitive activity is international, the relevant authorities may decide to pursue independent, joint or parallel investigations.¹⁰ For this reason, a party may decide to approach each authority separately. However, the Bureau recommends that any applicant whose business activity has a substantial connection to Canada should consider contacting the Bureau either before, or immediately after, contacting foreign competition law authorities. The Bulletin further highlights that a party who has been granted immunity or favourable treatment in another jurisdiction may not receive special consideration from the Bureau on that premise alone (and in fact, it has occurred that a party who received immunity in another jurisdiction was not first-in and did not receive immunity in Canada). If possible, companies should consider seeking immunity in all jurisdictions affected by the relevant activity. A company may be placed in a difficult position if it is cooperating in one jurisdiction and defending against an investigation in another, especially where those jurisdictions have

¹⁰ *Bulletin*, *supra* note 1 at 5.

information sharing agreements. Such agreements may have confidentiality exceptions for immunity applicants, but those matters must be carefully explored before proceeding.

VII. Confidentiality

In regard to information provided to the Bureau during a request for immunity, the Bureau guarantees absolute confidentiality except where:¹¹ (i) there has been public disclosure by the party; (ii) the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act; (iii) disclosure is required by law, i.e. as required to those who are charged with a criminal offence; or (iv) disclosure is necessary to prevent the commission of a serious criminal offence. If a private action should arise pursuant to section 36 of the Act, the Bureau's policy is to provide confidential documents and evidence only in response to a court order.

The FAQ addresses the question of whether the Bureau will disclose information provided by an immunity applicant to other enforcement agencies or to a foreign jurisdiction. The Bureau states that it will not share the identity of or the information provided by the immunity applicant to other enforcement agencies or a foreign agency, unless the immunity applicant has waived confidentiality.¹² If an applicant does not have immunity, however, the Bureau will not agree to stipulations in plea agreements which limit information disclosure to other anti-trust agencies. The rationale behind this is that Canada is party to international agreements which provide for mutual legal assistance among international anti-trust enforcement agencies and failure to disclose information to such agencies would undermine Canada's international obligations and limit the effectiveness of these agreements.

¹¹ *Bulletin*, *supra* note 1 at 6.

¹² *See FAQ*, - *Disclosure*.