THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Proposed Revisions to the Immunity and Leniency Programs

CANADIAN BAR ASSOCIATION
COMPETITION LAW SECTION

July 2018

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Competition Law Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Competition Law Section.

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I. INTRODUCTION

The Competition Law Section of the Canadian Bar Association (CBA Section) is pleased to participate in the Competition Bureau's second round of consultations on the proposed changes to the Immunity and Leniency Programs announced on May 8, 2018.[1]

In January 2018, the CBA Section made detailed comments, expressing serious concern with a number of changes to the Immunity Program initially proposed in October 2017.[2] We are pleased to see that the Bureau has taken into account our input (as well as that from other stakeholders such as the American Bar Association (ABA) and the International Bar Association (IBA)).

In particular, it is encouraging that a number of the more controversial proposed changes to the Immunity Program such as the recording of attorney proffers have been removed. It is also helpful that the Bureau has deferred the audio or video recording of witness interviews to a later or "advanced" stage of the immunity process, and made important changes to the proposed independent counsel (IC) privilege protocol. In its revised Immunity Program, the Bureau has also given additional assurances regarding the binding nature of the interim grant of immunity (IGI) and reaffirmed its acceptance of the *paperless process* (a hallmark of the Immunity Program since its inception in 2000).These are welcome changes, and we are encouraged the Bureau and the Department of Public Prosecutions (DPP) acknowledged stakeholders' concerns on these important issues.

That said, a number of our prior comments have not been addressed, and we remain concerned that the latest proposed revisions to the Immunity and Leniency Programs introduce significant uncertainty on the operation of these programs. This latest round of proposed revisions introduces new burdens on prospective immunity and leniency applicants, heavily emphasizes the spectre of revocation of immunity/leniency and suggests that draconian measures may be

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1 Draft Immunity and Leniency Programs under the Competition Act, May 8, 2018 (Draft Immunity and Leniency Programs).

2 CBA National Competition Law Section Submission, January 22, 2018.

imposed against parties whose immunity has been revoked (including the immunity applicant's evidence being used against them). In addition, the Bureau has not addressed requests from the CBA Section, ABA and IBA for additional clarity on whether it is proposing that an immunity applicant's investigative work product may be subject to production in Canada.

In short, by failing to address these uncertainties, and creating significant new burdens and risks, the proposed changes will place the immunity or leniency applicant at a distinct disadvantage relative to non-cooperating parties, particularly in responding to anticipated civil litigation. As a result, the proposed changes create disincentives for seeking immunity or leniency in Canada, and likely undermine the effectiveness of the programs going forward. We encourage the Bureau to reconsider its approach to these issues.

II. PROPOSED CHANGES TO IMMUNITY PROGRAM

While this section focuses on changes to the Immunity Program, several comments apply to proposed changes to the Leniency Program as well.

A. Risk of a Revocation of Immunity

The Bureau has added a number of new references to circumstances that may result in a breach of an immunity applicant's obligations and a resulting revocation of immunity. There are 14 existing references to the risk of "revocation" in the current Immunity Program (if the FAQ is included). However, under the proposed changes, 22 references to the risk of "revocation" are included.

The repeated references to the penalty of revocation is heavy-handed and unwarranted given our understanding that in only a few instances during the history of the Immunity Program has the possibility of revocation arisen, and there are no publicly reported cases where revocation has occurred. Moreover, by repeatedly referring to the possibility of revocation, an applicant will reasonably infer that its IGI will remain under a cloud of uncertainty until its cooperation obligations have been completely fulfilled.

Further, the Bureau includes several new examples of conduct that might warrant revocation of immunity. For example, while the Immunity FAQ previously referred to the requirement to organize records in an orderly fashion and avoid "record dumps" the Bureau now states that an overly inclusive production (a record dump) may result in a breach of the applicant's cooperation

obligations.[3] The suggestion that something as subjective as whether a set of documents is overly inclusive could trigger a revocation of immunity is not only troubling but also not in keeping with the types of factors or conduct identified in the PPSC's Prosecution Deskbook (Deskbook) as possibly warranting a revocation of immunity.[4]

Perhaps the most significant and troubling proposed change to the implications associated with a possible revocation of immunity is buried in the Model IGI Agreement. Section 15 of the Model IGI Agreement states that, in the event of a revocation, the DPP may use any information provided by the applicant "*after the application for immunity*" for the purposes of a prosecution and "*any privilege that may apply in respect of any information [...] provided is deemed waived* [...]".[5]

In our view, this suggestion is grossly unfair and punitive and also contrary to existing jurisprudence. The law in Canada is clear that settlement privilege applies to plea negotiations with the DPP, even if they are unsuccessful. While a party may be subject to a revocation of immunity, there is no basis in law for the DPP to claim the right to use the applicant's statements and information communicated for the purposes of settlement as part of a subsequent prosecution against that very applicant. This "deemed waiver" provision is inconsistent with other elements of the program,[6] and raises profound issues of due process. Such a heavy-handed approach is not only unnecessary, but also creates new risks for an applicant considering participating in the program – since there is a risk that statements made to the Bureau may be used to incriminate the applicant in a future proceeding. This provision should be removed.

B. Requirement to Give "Credible and Reliable Evidence" to Obtain Immunity or Leniency

Under the existing Immunity Program, an applicant is required to give "full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession." However, under the proposed changes, a recommendation for immunity will be made to the DPP only when the disclosed conduct "is supported by credible and reliable evidence that

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3 *Supra* note 1, at para. 98.

4 See PPSC's Prosecution Deskbook (Deskbook).

5 *Supra* note 1, Company – Model IGI Agreement, para. 15 [emphasis added].

6 *Supra* note 1, at para. 35(c) (The Immunity Program does not require applicants to waive applicable legal privileges as a condition for obtaining immunity).

demonstrates all elements of the offence".[7] Similar language is included in recommendations for leniency under the revised Leniency Program.[8]

This new requirement is unnecessary and adds significant uncertainty. Perhaps most fundamentally, no guidance is given on what constitutes "credible and reliable" evidence and the success of an immunity or leniency application hinging on this subjective and vague requirement creates uncertainty on the operation (and evaluation) of the programs. Further, at least at the initial stages, a prospective applicant may not be in a position to assess the full credibility and reliability of the underlying evidence. For instance, the applicant may not have full access to former employees or documents in the possession of individuals or competitors. Moreover, an applicant's overall credibility may only be revealed in the context of further interviews with the Bureau. An applicant has no control over the credibility of individual witnesses (which may shift over time), and its application for immunity or leniency should not be at the mercy of the Bureau's subjective perception of the credibility of a witness at a particular time.

More fundamentally, it is not the role of the immunity/leniency applicant to give assurances that a prosecution brought by the Bureau will ultimately be successful at trial. Rather, the applicant, having chosen to self-report, has agreed to cooperate and disclose "all non-privileged information, evidence and records" in its possession. The applicant is not (and should not be) an advocate on whether the Bureau has sufficient "credible and reliable evidence" to prove its case beyond a reasonable doubt at a criminal trial.

Accordingly, we recommend that the requirement to produce "credible and reliable evidence" of an offence be removed, since it introduces a new element of unpredictability that undermines the operation of the programs.

C. Eligibility of "Recidivists"

Under the proposed changes, if the immunity applicant is considered a "recidivist", the DPP may assess if it is in the public interest to grant an IGI.[9]

This change is ambiguous, particularly since there is no detail or definition given on when a company or individual will be considered a recidivist. It is not clear if an organization would qualify as a recidivist if it has made a prior immunity or leniency application in another unrelated

7 *Supra* note 1, at para. 28.

8 *Supra* note 1, at para. 122.

9 *Supra* note 1, at para. 80.

case, has been charged or convicted of an offence under the *Competition Act*, has been charged or convicted of an offence under any other statute, or it (or an affiliate or predecessor entity) has been charged or convicted of an offence outside Canada.

Given the uncertainties associated with introducing the concept of a recidivist, we recommend it be removed from the Immunity Program. Alternatively, the term should be defined so applicants can predict with reasonable certainty how they will be treated under the program.

D. Recording Witness Interviews

It is helpful that the Bureau has acknowledged our previously articulated concerns and the Immunity Program now states "[w]itness interviews may be audio or video recorded and may be taken under oath", but that "it is expected that sworn audio-video recorded interviews will be taken at *an advanced stage* of the investigation in order to support recommendations to the DPP."[10]

While this change is helpful, we remain concerned that recording witness interviews imposes new burdens and risks on the applicant and alters the incentives for self-reporting. By creating a contemporaneous record of the interview, the applicant will almost certainly be subject to further discovery demands for production of the recording in follow-on civil litigation in Canada. The existence of a recording may also complicate international antitrust investigations, since foreign regulators may require the recordings for their investigations and their prosecutions.

We recommend this section be amended to state that, as a general rule, the Bureau will conduct witness interviews on a verbal basis without audio-visual recordings. To the extent the Bureau reserves the right to record witness interviews in truly exceptional cases, we recommend the Bureau include a statement that it will take all reasonable measures to preserve the confidentiality of the recording subject to the requirements of the *Act*.

E. Applicant's Obligation to Secure Cooperation of Witnesses

Under the existing Immunity Program, an applicant is required to undertake "all lawful measures" to secure the cooperation of current and former employees. In the October 2017 version of the Immunity Program, the Bureau suggested changing this obligation to the requirement to

10 *Supra* note 1, at para. 96 [emphasis added].

undertake "all reasonable measures". However, the Bureau has now reverted to "all lawful measures."[11]

In our view, the scope of an applicant's obligation here has always been unclear, particularly for a former employee who is difficult to contact or refuses to cooperate. By continuing to use the phrase "lawful measures", it is unclear if the Bureau expects the applicant to resort to all legal means to compel cooperation, such as enforcing severance agreements or negotiating cooperation agreements. Moreover, an applicant's obligations should be subject to a test of reasonableness. It would be much clearer to adopt a standard of "all reasonable measures" for framing the applicant's obligation to secure the cooperation of witnesses.

F. Protocol for Reviewing Applicant's Privilege Claims

Under the proposed revisions to the Immunity Program, once the applicant enters into an IGI with the DPP, the applicant must provide "full, complete, frank and truthful disclosure of all non-privileged information, evidence or records" in the applicant's possession or control. The Bureau has confirmed that "[t]he Immunity Program does not require applicants to waive applicable legal privileges as a condition for obtaining immunity."[12] However, the Bureau proposes a new protocol for identifying, reviewing and adjudicating privilege claims made by the applicant.[13]

In general terms, within 30 days of the issuance of the IGI, the applicant must disclose the identity of its privilege claims, by delivering a form of privilege log. Upon receipt of this disclosure, the Bureau will refer the information to the DPP, and if the DPP is not persuaded of the applicant's privilege claims, the DPP will notify the applicant. Where the parties are in agreement, the applicant and the DPP may appoint an independent counsel (an IC) to assess the privilege claim. Where the use of an IC is "not available or considered appropriate", the parties may seek "the assistance of a court" to resolve the claim of privilege.[14]

In our prior submission, we expressed significant concerns with the proposed protocol, including its mandatory use of the IC process. We are grateful that the Bureau has taken steps to address some of these concerns, particularly by making the IC process subject to the express consent of

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11 *Supra* note 1, at paras. 38(d), 92.

12 *Supra* note 1, at para. 35(c) (The Immunity Program does not require applicants to waive applicable legal privileges as a condition for obtaining immunity.)

13 *Supra* note 1, at paras. 101-103.

14 *Supra* note 1, at paras. 101-103.

the applicant. However, our larger concerns with the nature and fairness of the protocol process, and the corresponding uncertainty and burden upon prospective applicants remain unaddressed.

Together with the CBA Section, the ABA and the IBA have previously asked for confirmation that the Bureau does not intend the IC process to apply to the applicant's investigative work product (i.e., the work product of the applicant's internal and external counsel in conducting its internal investigation).[15] In our view, the Bureau's silence on this point creates uncertainty and increases the perceived risks of participating in the program.

III. PROPOSED CHANGES TO LENIENCY PROGRAM

In addition to a number of the foregoing comments that apply to both programs, the following comments apply to the proposed changes to the Leniency Program.

A. Expulsion from the Program

The proposed changes include references to the risk of expulsion from the Leniency Program.[16] Again, the frequency and tone of the references to expulsion introduces a new element of uncertainty to the programs, by repeatedly conveying that an applicant's leniency protection is always at risk.

Also, different language is used for both programs: an immunity applicant that fails to comply with the program may be subject to "revocation" of its marker, where a leniency applicant that fails to comply with the program may be subject to "expulsion".

In addition to these inconsistencies, the Bureau has introduced the possibility of "cancellation" of an immunity or leniency marker.[17] It is unclear why different terminology is used when the underlying concept is the same – namely, a loss of a marker. For clarity and predictability, the program should consistently refer to "revocation".

Little procedural guidance on the process for revoking a leniency marker is offered, beyond a general statement that a "cancellation of a leniency marker" will be made only "after serious consideration of all factors" and with 14 days advance notice.[18] Given the serious implications of a revocation of leniency, basic elements of due process should apply. The applicant should be

15 CBA Submission, January 22, 2018; ABA Submission, January 19, 2018.

16 See, e.g., *supra* note 1, at paras. 125 (risk of "expulsion" for acts of obstruction), 159 (risk of being "expelled" for delay).

17 *Supra* note 1, at paras. 29, 66, 70, 165, 169, 184, 211, 212.

18 *Supra* note 1, at para. 169.

entitled to notice, an opportunity to make submissions and an opportunity to remedy any non-compliance. The Bureau should also be required to implement with a scale of progressive steps to encourage compliance (warnings, required meetings, etc.) before resorting to the drastic step of revocation.

In addition, we understand the Bureau has in some instances, retracted or withdrawn its prior recommendation of leniency provided to the DPP while the leniency applicant was in the midst of negotiations with the DPP regarding resolution. The circumstances where the Bureau would seek to retract or withdraw its recommendation to the DPP are not addressed in the revised Leniency Program. Given the significant ramifications of suchaction, and in the interest of transparency and predictability, we urge the Bureau to articulate the circumstances that could give rise to a retraction or withdrawal, as well as the process for a retraction or withdrawal (e.g., notice to the leniency applicant).

B. Prohibition Orders

In its revised draft of the Leniency Program, the Bureau states that "[o]rdinarily, the plea agreement will also require the leniency applicant to formalize its cooperation obligation by requiring it to consent to a prohibition order made pursuant to section 34 of the Act".[19]

In our view, this proposed change is unnecessary and leaves leniency applicants worse off than non-cooperating witnesses. Moreover, it is questionable if these cooperation obligations may be imposed under section 34.

We believe this step is unnecessary given that the leniency applicant is already under an obligation to cooperate and faces the threat of revocation of leniency if it does not cooperate. Further, taking the additional step of incorporating a leniency applicant's cooperation obligations in a court order is heavy-handed and increases the risk profile of participating in the program (in that it imposes significant risks for allegations of breach of a court order as well as possible revocation).

In any event, it is not clear that an applicant's cooperation obligations are properly the subject of a prohibition order. The court's jurisdiction under sections 34(1) and (2) of the Act is generally focused on future compliance, namely "to prevent the commission, continuation or repetition of the offence". It is arguable whether an obligation to cooperate with the prosecution of another party falls within the intended purpose of such an order.

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19 *Supra* note 1, at paras. 192 & 208.

Accordingly, we recommend that the suggested practice of enshrining a leniency applicant's cooperation obligations into a prohibition order be removed.

C. Calculation of Base Fine

To promote an effective Leniency Program, the benefits (and costs) of seeking leniency must be transparent and predictable. The proposed guidance on the calculation of a base fine remains considerably uncertain.

It is not clear when the Bureau will rely on direct sales, indirect sales or both in assessing the applicant's affected volume of commerce. The revisions simply state "the Bureau may include an Applicant's indirect sales into Canada", without articulating the circumstances when this approach would occur.[20] In our view, it is not appropriate (as a general matter) to rely on indirect sales in calculating the applicable fine. The Bureau should clarify that, as a general rule, it will use the applicant's direct sales into Canada for the purposes of calculating a base fine. However, where the product is an input and the applicant has minimal direct sales into Canada, the Bureau may choose to rely on indirect sales.[21]

The Bureau should give clearer guidance to prospective applicants that it will consider fines paid in other jurisdictions and will avoid imposing duplicative fines in Canada on the same sales. The Bureau states that where an applicant has paid a fine in another jurisdiction for the direct sales that led to the indirect sales into Canada, "the Bureau *may* consider, on a case-by-case basis" whether such fines are adequate to address "the economic harm in Canada resulting from indirect sales".

We believe the Bureau should clearly indicate that it *will* consider such foreign fines. As a matter of fundamental fairness in the criminal process, an applicant should not be subject to two fines for the same conduct or the same dollars of sales. From a practical perspective, a prospective applicant is less likely to participate in the Leniency Program if it will be subject to duplicative fines (as well as follow-on class actions) that greatly exceed any reasonable estimate of the gains from the wrongful conduct.

The proposed revisions also contemplate a unilateral assessment of the applicant's affected volume of commerce that is not subject to submissions or negotiations. Under the existing program, "the Bureau will, where necessary, *work with the applicant* to develop a feasible

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20 *Supra* note 1, at para. 130.

21 *Supra* note 1, at footnote 28.

methodology to estimate the affected volume of commerce associated with its indirect sales into Canada."[22] This cooperative language has been removed in the proposed revisions to the Leniency Program. In our view, the Bureau would benefit from the cooperation of the applicant, and should confirm that it is willing to work with the applicant in developing a methodology for assessing indirect sales.

Finally, we understand there has been some uncertainty on whether the Bureau or the DPP has ultimate authority to calculate and negotiate an appropriate fine with a leniency applicant (e.g., whether and how to apply the proxies). Section 4.4 of the Deskbook states "Crown counsel are responsible for conducting all plea and resolution discussions in accordance with the PPSC Deskbook guideline 3.7 "Resolution Discussions". Given the respective roles of the Bureau and the DPP in the investigation and prosecution of criminal offences under the Act, it would be helpful for the revised program to confirm (consistent with the Deskbook) that it is, in fact, the DPP who has jurisdiction over the ultimate fine to be recommended to the court as part of a guilty plea by a leniency applicant.

D. Leniency Cooperation Credit

In one of the more significant proposed changes to the Leniency Program, the Bureau proposes that every leniency applicant will be eligible for a "leniency cooperation credit of up to 50%" assigned based on "the value of the leniency applicant's cooperation to the Bureau's investigation".[23]

We generally support the Bureau's proposal to increase the potential cooperation discounts available to second-in and third-in leniency applicants under the Leniency Program. However, the process for assessing the amount of the Leniency Cooperation Credit (LCC) is opaque and discretionary, diminishing the positive impact of this change by creating new uncertainties.

By assessing the discount through the subjective lens of "the value of the leniency applicant's cooperation", the Bureau's assessment could lead to perverse results for second-in, third-in and subsequent applicants. For instance, a second-in cooperating party that was only a minor player in the conspiracy may receive a lower discount relative to a third-in cooperating party, who was leading the conspiracy and slower to self-report, but who could be seen to have more "valuable" evidence for prosecuting other parties. More generally, the parties who led the conspiracy and

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22 *Leniency program: Frequently asked questions*, at Step 3 [Emphasis added].

23 *Supra* note 1, at paras. 142-143.

who engaged in the conduct for the longest time could be eligible for the greatest discounts, since they may have the most "valuable" cooperation to offer.

At a minimum, the Bureau should clarify how it will evaluate the "value" of an applicant's cooperation. For instance, it would be helpful to know if the Bureau sees value in how quickly the information was provided or value in the volume of information or documents (or any other factors).

E. Compliance Program Credit

We generally support the spirit of this change. That said, it would be helpful if the Bureau could give additional guidance on the applicable process and factors it would apply in determining whether the compliance program is credible and effective. For instance, it would be informative to know how a party's compliance program would be assessed and whether the program would be expected to have certain basic requirements.

F. Immunity Plus Credit

We also support the Bureau's commitment to extend an additional "Immunity Plus" credit to leniency applicants who self-report further offences not known to the Bureau.[24] However, given the value of this benefit to the Bureau and relative credits available for other mitigating factors (e.g., the Compliance Program Credit), we believe this credit should be raised from 5-10% to a more robust 20%.

G. Witness Interviews

The Bureau has indicated it will seek to conduct interviews with the leniency applicant's key witnesses, who will be identified in the plea agreement. The Bureau has further indicated that these interviews may be taken under oath and video recorded.[25] However, in contrast to the guidance in the Immunity Program, the Bureau has not clarified that these video recorded interviews will typically be conducted at an advanced stage of the case.

The policy arguments in favour of deferring video recorded interviews until an "advanced" stage in the case apply with equal force to both programs. Accordingly, these passages should be revised to align with the Immunity Program.

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24 *Supra* note 1, May 8, 2018, at paras. 145.

25 *Supra* note 1, May 8, 2018, at para. 180.

IV. LACK OF GUIDANCE ON IMPLEMENTATION

There is no guidance on as to the proposed implementation of the proposed changes to the Immunity and Leniency Programs – and in particular, whether the changes apply to all pending cases or whether they only apply to new cases (i.e., where the applicant applies for the marker after the implementation of the changes). In addition, it may be that some changes have immediate effect, where others may require a transitional period.

It is a core principle that effective immunity or leniency programs must be transparent and predictable. Clear guidance on the Bureau's implementation plans is essential for the effective functioning of these programs.

V. CUMULATIVE IMPACT OF PROPOSED CHANGES TO IMMUNITY AND LENIENCY PROGRAMS

In summary, many of the proposed changes to the Immunity and Leniency Programs are unnecessary, create new risks and burdens for future immunity applicants and lead to more disputes and delays for the Bureau and the DPP in managing a cartel case.

With the benefit of these comments, we return to one of our previous observations. It is a core principle of the Immunity and Leniency Programs that a cooperating party should not be made worse off by deciding to self-report to the Bureau. However, the cumulative impact of the proposed changes creates new risks and exposures for parties deciding to seek immunity and leniency.

Under these circumstances, the CBA Section believes the Bureau's proposed changes will fundamentally alter the considerations for seeking immunity, and might encourage prospective applicants to *skip Canada,* given the burdens and uncertainties of obtaining immunity or leniency.

We encourage the Bureau to reconsider a number of its proposed revisions to the Immunity and Leniency Programs, since as currently proposed these revisions will undermine the goal of effective criminal enforcement in Canada.

VI. CONCLUSION

We are grateful for the opportunity to participate in the Bureau's consultation process on the proposed changes to the Immunity and Leniency Programs. We hope that our comments will contribute to the Bureau's review of these important issues.