

July 13, 2000

Andrea Rosen
Senior Commerce Officer
Competition Bureau
Place du Portage
50 Victoria Street
Hull, QC K1A 0C9

Dear Ms. Rosen:

Re: Draft Interpretation Bulletin on Immunity Program Under the *Competition Act*

The National Competition Law Section of the Canadian Bar Association (the Section) appreciates the opportunity to provide comments on the Draft Interpretation Bulletin on the Immunity Program (the Immunity Bulletin), released by the Competition Bureau on February 17, 2000. This letter has been reviewed by the Canadian Bar Association's Legislation and Law Reform Committee and approved by its Executive Officers.

The Section agrees with the Bureau's objectives in narrowing the earlier Draft Interpretation Bulletin on the Co-operating Parties Program (Co-operating Parties Bulletin), and replacing it with an immunity program that is more straightforward. We trust that the following comments will assist the Bureau in its object of providing a comprehensive, clear and concise statement of the Bureau's policy in this important aspect of enforcement.

Paragraph 3 – Criminal Provisions of the *Competition Act*

The Immunity Bulletin states: “[t]he *Competition Act* contains criminal provisions [set out in Appendix I] that prohibit anti-competitive business activities such as conspiracies to fix prices and allocate markets, bid rigging, price maintenance and deceptive marketing practices...”

This does not recognize an important qualification for criminal sanctions in section 45 of the *Act*, namely that competition must be unduly prevented or lessened. Moreover, the conspiracy provisions of the *Act* (ss. 45-49) do not expressly mention price-fixing and market allocation. This sentence should therefore be reworded to state: “[t]he *Competition Act* contains criminal provisions [set out in Appendix I] that prohibit anti-competitive business activities such as conspiracies that prevent or lessen competition unduly, bid rigging, price maintenance and deceptive marketing practices...”

Paragraph 5 – Earlier Statements by Bureau Officials

The last sentence of this paragraph states that the Immunity Bulletin “. . .expands upon and supersedes earlier public statements by senior Bureau officials”. This may have been true with respect to the Co-operating Parties Bulletin. However, the statement is ambiguous in relation to the Immunity Program because Bureau officials have made earlier statements on forms of leniency other than immunity. To ensure certainty in the legal and business communities, the Bureau should clarify whether the Immunity Bulletin also supersedes earlier statements about other forms of leniency.

Paragraph 7 – Legal Advice

We take no exception to paragraph 7 itself, which is the same as paragraph 1.7 in the Co-operating Parties Bulletin. However, the Immunity Bulletin deletes an important reference found in paragraph 1.6 of the Co-operating Parties Bulletin, that the Bulletin is not a binding statement of the Bureau’s position in any individual case. Rather, individual enforcement decisions are made on a case-by-case basis.

We assume the Bureau’s position remains the same. However, the omission could lead prospective seekers of immunity to believe that the Immunity Bulletin is binding. We therefore suggest that the contents of the earlier paragraph 1.6 be reinstated in the Immunity Bulletin, unless the Bureau intends that the Immunity Bulletin to be binding in individual cases. If so, this should be expressly stated.

Paragraph 10 – Other Forms of Leniency

When the Bureau released the Immunity Bulletin in February 2000, Bureau officials suggested that there would be no leniency program. However, the last two sentences in this paragraph suggest that there is some form of leniency policy other than full immunity. These are the only express statements in the Immunity Bulletin about other forms of leniency. This is confusing and should be clarified, as permitting other forms of leniency may undermine the Bureau’s purpose in detecting criminal conduct through a full immunity program.

Paragraph 13 – Situations Where the Commissioner May Recommend Immunity

This paragraph describes two situations where the Commissioner is prepared to recommend immunity. We believe the Commissioner should also be prepared to grant immunity where:

- the Commissioner is aware of an offence;
- the Commissioner has referred the matter to the Attorney General; and
- the Attorney General has not indicted any person because the circumstances require the cooperation of a party to the offence to provide evidence necessary for a conviction.

We ask the Bureau to consider this situation even though it would be a use of immunity for a purpose other than detection. In our view, the principle underlying the grant of immunity in example 13(b) is not detection of the offence but rather obtaining a conviction. Our suggestion is not an undue extension of this principle.

Paragraph 15 – Where an Individual is an “Instigator”

A company should qualify for immunity where one of its senior executives is an instigator and acts secretly, such that the company could not reasonably have detected the executive’s conduct. This, of course, assumes that the company has otherwise met the conditions set out in the Immunity Bulletin. In such circumstances, immunity for the company would be consistent with the Bureau’s purpose of detection, as it would allow the company to reveal the whole story without risk of liability.

It is not clear from the Bulletin whether this is the Bureau’s intention. We believe that it should be and that the Bulletin should be amended accordingly.

Similarly, employees should qualify for immunity where senior executives coerce them to engage in the unlawful conduct. In practice, subordinate employees are often dealt the harshest result because of the economic power of their superior. Further, their cooperation would assist the Bureau and the Attorney General in obtaining a conviction of the executive.

Paragraph 17 – Restitution

The language of this paragraph is too vague. In our view, this may discourage parties from seeking immunity in two situations.

The first arises from an interpretation of the phrase “make restitution for the illegal activity”. This could arguably require a party to compensate all the victims to the full extent of their losses. In such circumstances, a company with significant financial resources would be discouraged from coming forward. As paragraph 15 forbids a grant of immunity to a party which is the sole beneficiary of an illegal activity, this problem could be overcome if the amount of restitution is proportional to the party’s benefit from the activity.

In the second situation, a company whose financial resources are insufficient to compensate even its proportional share of the victims’ losses would be unlikely to come forward if it believed its own confession would cause its financial ruin. A company in financial difficulty would be more likely to seek immunity if restitution were limited to the extent of significant financial harm. Generally speaking, it is not in the public interest to significantly weaken or destroy a business that can continue as a competitor.

Accordingly, we suggest the following language for paragraph 17: “Where appropriate, the party must consent to an order of prohibition under subsection 34(2) of the *Competition Act* and it must make restitution to the victims. The amount of restitution will be commensurate with the benefit that the party obtained from the illegal conduct in relation to other participants and will recognize any significant financial harm which may be caused to the party.”

Paragraph 20 – Past and Present Directors, Officers and Employees

The Guidelines should give an example of a situation where this paragraph would apply.

Paragraph 34 – Confidentiality with Respect to Foreign Agencies

We agree that the Bureau should ensure confidentiality of the applicant’s identity and of the information the applicant provides. However, for greater certainty, the Bureau should state that it will not provide this information to a foreign agency even if it is “for the purposes of the administration or enforcement of the *Act*” under section 29 of the *Act*.

Paragraph 35 – Confidentiality with Respect to Private Actions under Section 36 of the *Act*

In paragraph 35 of the Immunity Bulletin, the Bureau states that it “will resist subpoenas and other applications for disclosure and will vigorously make all appropriate claims of privilege...”

Issues of confidentiality require balancing two sets of interests. On the one hand, denying information to private litigants will “chill” the already cool climate of civil actions under section 36 of the *Act*. This risks diminishing the importance of section 36 as a method of enforcement at a time when the Commissioner has stated that he favours increasing the availability of civil remedies under the *Act*. On the other hand, providing section 36 litigants with information disclosed under the Immunity Program would arguably have a chilling effect on prosecutions under the *Act*. Parties will be less likely to seek immunity knowing that the information they disclose will be readily provided to third parties who have commenced a section 36 action.

Although we recognize the importance of section 36, on balance we believe it is better to encourage more prosecutions under the *Act*. The Bureau’s approach to disclosure will assist in pursuing this objective.

We also have concerns about the Bureau’s representation that it could claim privilege over information provided by an applicant. “Privilege” is a loaded word, having a specific connotation in a legal context. It suggests that statements will enjoy a certain level of protection which might not be available in these circumstances. Claims of privilege tend to be very restricted in the criminal process given the Crown’s disclosure obligations.

Although many who are contemplating disclosure under the Immunity Program will seek legal advice on these issues, we wouldn't wish anyone to be misled. We suggest that the word "privilege" be removed and that the paragraph be amended to provide that the Bureau will use all available arguments to protect information imparted during the Immunity Program.

The Section welcomes the opportunity to suggest improvements to the Immunity Bulletin and looks forward to discussing these matters with you. You may contact me directly at (416)863-2709 or through Richard Ellis at the CBA's National Office (tel: (613)237-2925, ext. 144; fax: (613)237-0185; email: richarde@cba.org).

Yours truly,

Warren M. H. Grover, Q.C.
Chair, National Competition Law Section