IMMUNITY PROGRAM

RESPONSES TO FREQUENTLY ASKED QUESTIONS

Introduction

In September 2000, the Competition Bureau (the Bureau) released *The Immunity Program Under the Competition Act* ("the Bulletin") which explains the policy and procedures relevant to a party's[1] application for immunity from prosecution for criminal offences under the *Competition Act* (the Act). It describes current practices employed by the Bureau and explains the Bureau's role in the immunity process. The Bulletin also sets out the conditions under which the Bureau will recommend that the Attorney General grant immunity and the process used in such cases.

The Bulletin was supplemented in 2003 by a series of Frequently Asked Questions (FAQs) published on the Bureau Web site. The following "Responses to Frequently Asked Questions" ("Responses") replace the 2003 FAQs and further clarify the application of the Immunity Program. The Responses are divided into categories that reflect the steps in an immunity application as outlined in Part E of the Bulletin.

Immunity is most often granted in the case of a conspiracy (also known as a cartel). While the Immunity Program applies in the case of other criminal competition offences under the Act such as false or misleading representations and deceptive marketing practices, bid-rigging and price maintenance, many of the questions below deal with a conspiracy situation. A similar approach will be taken in immunity cases involving other criminal competition offences.

This document does not give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern. The Bureau may choose to depart from the approach set out in this document in exceptional circumstances.

[1] As described in the Bulletin, the term "party" means a business enterprise or individual. In this document it is also used interchangeably with "immunity applicant" and "applicant".

Step 1: Initial Contact

Placing a Marker

1. What is a marker?

A "marker" is the confirmation given to an immunity applicant that it is the first party to approach the Bureau and request a recommendation of immunity with respect to criminal activity involving a particular product[2]. The marker guarantees the applicant's place at the front of the line as long as the applicant meets all other criteria of the Immunity Program. The applicant then has a limited period of time, usually 30 days, to provide the Bureau with a detailed statement describing the illegal activity, its effects in Canada and the supporting evidence. This statement is known as a "proffer" and is described in more detail in the responses to questions 13, and 15 through 20.

2. For what offences is a marker available?

A party may request a marker for anti-competitive activities subject to sanction under the criminal competition provisions of the Act. Offences described in sections 45 to 51 and section 61 of the Act, including conspiracy (sections 45 and 46), bid-rigging (section 47) and price maintenance (section 61), are handled by the Criminal Matters Branch. False or misleading representations and deceptive marketing practices (sections 52 through 55.1) are handled by the Fair Business Practices Branch.

3. Who can request a marker?

An individual or a business enterprise (a "party") can request a marker. In the Bulletin, the terms *firm*, *company* and *corporation* are used interchangeably to denote a business enterprise. The Bureau may consider not-for-profit organizations and trade and professional associations as business enterprises.

4. Are joint requests for markers, and subsequent immunity, accepted?

Inquiries have been made as to whether two or more companies can jointly request immunity under the Immunity Program.

The Bureau and the Attorney General will not consider joint requests: only one participant per cartel

[2] "product" includes an article and a service.

will be granted immunity under the Immunity Program. An exception can be made in the case of a joint request from companies that are affiliated, as defined in section 2 of the Act.

5. Who should a party contact to place a marker?

Markers are given by either the Senior Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices. (See the response to question 2, above, for a description of the offences that are handled by each branch). Contact information is provided at the end of this document.

If contacting the Bureau by telephone, an applicant should indicate that it is making a marker call. The applicant should take care to ensure that all information is clearly stated and that it and the Senior Deputy Commissioner or Deputy Commissioner are in agreement that a marker has been requested, on the time of the request and on the description of the relevant product. The Bureau will advise within a few days, by telephone, whether the requested marker is available to the applicant.

6. Does the Attorney General's office grant markers?

No. The Attorney General's office, including the Competition Law Division (CLD) which acts as counsel to the Competition Bureau, does not accept marker calls or provide markers to immunity applicants. The Attorney General's office, including CLD, will forward any marker call to the Bureau. Applicants cannot rely on contact with the Attorney General or CLD as establishing a marker.

7. Why is it important to be "first-in"?

The Bureau will only grant a marker, with respect to particular conduct, to the first party to request immunity. Subsequent applicants may seek another form of lenient treatment, such as a reduction in sentence, but will not be eligible for a recommendation of immunity by the Bureau to the Attorney General unless the "first-in" party ultimately does not qualify.

It is the Bureau's view that by maintaining the "first-in approach", we will ensure that parties will not wait for their co-conspirators before reporting an illegal activity to the Bureau. Parties should come forward as soon as they believe they are implicated in an offence, so as to ensure their status as "first-in" to qualify for immunity.

8. If a party is unsure if an offence has been committed, or what products are involved, should it place a marker anyway?

Yes. The Bureau encourages parties to come forward and request a marker as soon as they believe

they may be implicated in an offence. If a party later determines that it was not involved in an offence, the marker should be withdrawn. In situations where an applicant provides insufficient evidence of an offence, the Bureau can decide to revoke the marker, as described further in the response to question 16. The Bureau will not recommend that the Attorney General grant immunity if there is insufficient evidence that an offence under the Act occurred.

9. Is it true that all immunity cases are international cases?

No. To date, the majority of immunity applications made to the Bureau involve international conspiracies, however the Immunity Program applies equally to domestic anti-competitive activity.

10. What kind of information is the Bureau looking for at the marker stage?

The Bureau requires sufficient information to determine whether an immunity applicant is "first-in" under the Immunity Program. It does this by comparing the product description received to information in its marker database and by ensuring that no other party already has requested a marker for the same conduct. For this reason it is important that the applicant, or its legal representative, provide a precise product definition including a description of any sub-products covered by the marker request. The Bureau also appreciates receiving additional details about the conduct, the time period in which the conduct occurred, and the parties involved, so that it can begin preliminary research.

11. Can the information provided be hypothetical?

Yes. An applicant may provide hypothetical information at this stage and is not required to reveal its identity. At this stage, information often is provided through an applicant's legal representative.

12. Can a marker be revoked?

Yes. If an applicant who has obtained a marker fails to provide a proffer within 30 days, the marker can be revoked and another party may be permitted to place its marker, unless the Bureau and the first applicant have agreed on an extended deadline, as described in the response to question 16. A marker may also be revoked if an applicant fails to meet any of the other requirements for immunity set out in Part C of the Bulletin.

The Bureau's decision to revoke a marker will be made only after serious consideration of all factors and after notifying the applicant.

Step 2: Provisional Guarantee of Immunity (PGI)

13. What is a proffer?

After placing a marker and completing its internal investigation an applicant must provide the Bureau with a statement, known as a proffer. In a proffer, an applicant describes in detail the activity for which immunity is sought, its effect in Canada, and the supporting evidence. Proffers typically are hypothetical and provided by an applicant's legal representative.

14. What is a PGI?

After receiving a proffer, the Bureau will present the information to the Attorney General with a recommendation as to whether the Attorney General should provide the applicant with a PGI. A PGI gives an applicant interim immunity until the Bureau and the Attorney General are able to fully assess its immunity application based on disclosure of the evidence, including interviews of witnesses and document review as described in the response to question 21. The Attorney General has the final independent authority to decide if a PGI will be granted to an applicant. The Attorney General's policy on immunity is articulated in a document published by the Department of Justice.[3]

15. When should a proffer be made?

An applicant is required to provide complete and timely cooperation throughout the Bureau's investigation and any subsequent prosecution and to "cooperate fully, on a continuing basis, expeditiously...". A party should make a proffer as soon as possible after receiving its marker. The Bureau believes that in most cases it is reasonable to require an applicant's proffer within 30 days of the initial marker contact. Timing is usually discussed during the marker call or shortly thereafter, and a schedule is set for providing the information.

Delay in providing a proffer can affect other steps in the Bureau's investigation, such as a search or cooperation with another jurisdiction, where timing can be critical.

16. What if an applicant cannot meet the 30-day deadline? Will the marker be revoked?

If an applicant does not believe it can produce its proffer within 30 days, this must be communicated to the Bureau as soon as possible after the marker call, together with reasons for the delay. The Bureau

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[3] Refer to the *Federal Prosecution Service Deskbook*, Department of Justice Canada, particularly Part 7, Chapter 35, Immunity Agreements, available on the Department Web site at: http://canada.justice.gc.ca/en/dept/pub/fps/fpd/.

will decide whether the delay is reasonable and, where appropriate, establish a schedule for delivery of the proffer. A delay may be warranted in complex cases particularly where multiple jurisdictions are involved or, for example, where a key witness is ill or otherwise unavailable. Parties should alert the Bureau to anticipated delays as early in the process as possible to avoid harm to other steps in the Bureau's investigation.

The Bureau's decision to revoke a marker will only be made after serious consideration of all factors and after notifying the applicant.

17. What kind of information should be provided at the proffer stage?

At the proffer stage an applicant must cooperate fully with the Bureau. It should provide details of the activity for which immunity is sought and all the evidence that it can, relating to that activity. Accuracy is critical; the Bureau relies on the information provided to assess the immunity application and to pursue its investigation of other participants in the alleged offence.

The Bureau does not require exhaustive evidence at this stage but will not accept a bare outline of the conduct or speculation as to an applicant's role. Even if an applicant's role was minor, the Bureau expects to learn details of that role and to gain a clear idea of what information each witness can provide about the conduct. Information should be as complete and accurate as possible and reported with candour and in a spirit of cooperation.

Topics that should be covered in a proffer include those set out below. Not all of these topics will be relevant to every offence. For example, evidence of an undue lessening of competition is required only in the case of a conspiracy. This list is not intended to be exhaustive and the information required will depend on the facts of each particular case.

<u>The Parties:</u>

- a general description of the applicant and the other parties implicated in the conduct (although actual identities are not typically disclosed at this stage);
- ownership structures and affiliations;
- membership in or involvement with trade or other associations;
- level of involvement in the offence (i.e. whether an applicant was the instigator or the sole beneficiary of the offence in Canada);

<u>The Markets</u>

- the product involved in the conduct;
- the geographic scope of the conduct;
- the time period when the conduct was in effect;

- the representations involved and the medium;
- the intended target of the representations;
- whether others continue to engage in the conduct;

The Industry

- a general description of the industry and how it functions;
- how pricing in the industry works and the existence and nature of contracts;
- how the product is supplied;

The Conduct

- a description of the conduct;
- monitoring or enforcement measures related to carrying out the offence;
- whether any agreement or arrangement was set out in writing;

The Impact of the Conduct

- the effect of the conduct;
- the volume of commerce involved;
- a general description of the key customers in Canada and whether any are aware of the conduct or have complained about it;

Evidentiary Process

- a general description of witnesses that the applicant believes could testify about the conduct and the anticipated nature of their evidence;
- records available to the applicant that provide evidence of the conduct;

International Issues

- whether an application for immunity has been made, or is expected to be made, in other jurisdictions.

18. What is undueness in a conspiracy case? Do I have to show undueness in order to qualify for immunity?

Section 45 of the Act prohibits agreements to prevent or lessen competition "unduly" or to enhance prices "unreasonably". A conspiracy must meet the threshold of undueness or unreasonableness before it can be considered a criminal offence. It is the combination of market power and behaviour likely to injure competition that makes a lessening of competition undue. The determinants of market power include such factors as market shares, the number of competitors and the concentration of competition, barriers to entry, geographical distribution of buyers and sellers, differences in the degree of integration

among competitors, product differentiation, countervailing power, and cross-elasticity of demand.

Market information provided by an applicant at the proffer stage enables the Bureau to assess the likely impact of the arrangement and whether it has caused an undue lessening of competition. Applicants are not required to demonstrate decisively to the Bureau that an undue lessening of competition has occurred. The offences of bid-rigging, price maintenance, false or misleading representations and deceptive marketing practices do not require that an undue lessening of competition be shown.

19. Does the Bureau provide opinions on whether past conduct amounts to an "undue lessening"?

The Immunity Program is not a mechanism for obtaining advice or opinions about whether past conduct contravened the Act. Similarly, written opinions (binding opinions of the Commissioner issued pursuant to section 124.1 of the Act) are not available for conduct that has already taken place.

If a party wants to seek advice on the applicability of the Act to proposed conduct it may request a written opinion from the Commissioner. Written opinions are binding on the Commissioner if all the material facts have been submitted and those facts are accurate. The fees for written opinions are set out in the Bureau's Fee and Service Standards Handbook[4].

20. Are oral proffers accepted?

Yes. The Bureau accepts both written and oral proffers. In oral proffers Bureau officers take notes of the information provided. Applicants should take special care in an oral proffer to ensure that all information is clearly stated and that counsel for the applicant and the Bureau officers are in agreement on the nature of the information provided. Accuracy is critical as the Bureau relies on the information to assess the immunity application and to pursue its investigation of other participants in the alleged offence.

Step 3: Full Disclosure

21. What information is required after a PGI is granted?

An applicant is required to provide complete and timely cooperation throughout the Bureau's investigation and any subsequent prosecutions. This includes full, frank and truthful disclosure of all the

[4]The Handbook is available on the Bureau Web site at: http://strategis.ic.gc.ca/pics/ct/ct02469e.pdf.

evidence and information known or available to the applicant. The Bureau will want to view and obtain copies of documents and to interview witnesses, at times under oath and recorded on video or audio-tape. Topics addressed will be covered in greater detail but will generally be the same as those addressed at the proffer stage (see the responses to questions 17 and 18, above).

Again, accuracy of the information provided is critical; the Bureau relies on this information to assess the immunity application and to pursue its investigation of other participants in the alleged offence.

A party who provides false or misleading information to the Bureau in the context of an immunity application and performance of related obligations could be disqualified as ineligible for immunity and face revocation of a PGI or immunity agreement. The party could also face a criminal charge of obstructing a Bureau inquiry or examination under section 64 of the Act. Providing false or misleading information under oath can also lead to charges, including perjury or obstruction, under Canada's *Criminal Code*[5].

22. How soon do witnesses and documents need to be made available after the PGI is granted?

An immunity applicant is required to "cooperate fully, on a continuing basis, expeditiously..." with the Bureau's investigation. This means that the applicant must make documents and witnesses available as quickly as possible. Relevant documents are usually used in witness interviews and should be provided to the Bureau at least two weeks before an interview. Typically a schedule for post-proffer production should be established early in the process and production of information completed within a six-month period. The Bureau will not accept lengthy delays or the non-availability of witnesses based on other commitments, including commitments that arise from immunity applications in other jurisdictions.

The objective of the Immunity Program is to stop illegal activity by the applicant and to obtain information that can be used to pursue the other participants in the illegal activity. Timing is critical to the Bureau's enforcement interest and in particular to locating evidence as quickly as possible and coordinating investigatory steps with other jurisdictions.

23. Are witnesses required to travel to Canada?

Witnesses for an immunity applicant must travel to Canada or another mutually convenient location to be interviewed by the Bureau unless special circumstances justify a different approach. Business enterprises applying for immunity are required to cover their own expenses and the expenses of

[5]Available on the Department of Justice Canada Web site at: http://laws.justice.gc.ca/en/C-46/.

witnesses travelling on their behalf.

24. Can the information I provide as full disclosure be used against me?

As described in paragraph 23 of the Bulletin, the full disclosure process will be conducted on the understanding that the Bureau will not use the information against the applicant providing it unless the applicant fails to comply with the terms of its immunity agreement. An applicant's continuing obligations under an immunity agreement are described below in the response to question 26.

STEP 4 - Immunity Agreement

25. What happens after I have fully disclosed my evidence to the Bureau?

When the Bureau is satisfied with the disclosure of evidence by an applicant, and if all relevant requirements of the Immunity Program are met, the Bureau will make a recommendation to the Attorney General that immunity be granted for the offence in question. The Attorney General has the final independent authority to decide if an immunity agreement should be entered into with an applicant. The terms of the immunity agreement will typically have been negotiated at the same time as the PGI. The Attorney General's policy on immunity is articulated in a document published by the Department of Justice.[6]

26. What are an applicant's obligations once an immunity agreement is in place?

As set out in paragraph 16 of the Bulletin, an immunity agreement will require that an applicant continue to provide complete and timely cooperation throughout the course of the Bureau's investigation and subsequent prosecutions. This means that an applicant must continue to provide full, frank and truthful disclosure of any evidence and information and must continue to cooperate fully, on a continuing basis and in a timely fashion. Cooperation may include a requirement for an applicant, or its directors, officers and employees, to testify in court.

27. Can an Immunity Agreement be Revoked?

As set out in Part F of the Immunity Bulletin, failure to meet the requirements of the immunity agreement may result in the Bureau resuming its investigation of an applicant further to a recommendation to the Attorney General to revoke the immunity agreement and take appropriate action against the party concerned.

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[6] Supra note 3.

Other

28. To qualify for immunity I am required to stop participating in the conduct in question but doing so may alert other participants that I've approached the Bureau, and affect the Bureau's investigation. What should I do?

Applicants are required to stop participating in the illegal activity in order to qualify for immunity. Applicants should raise any concerns they have regarding possible impacts on the investigation with the Bureau.

29. How do you define "the instigator or the leader of the illegal activity"?

Paragraph 15 of the Bulletin states that one of the requirements that must be met in order to obtain immunity is that "The party must not have been the instigator or the leader of the illegal activity". Questions have arisen as to the meaning of this phrase.

Paragraph 15 of the Immunity Bulletin requires that the immunity applicant was neither "the" instigator nor "the" leader, as opposed to "an" instigator or "a" leader. This means that a single corporation or individual which alone played the leading role, or the sole instigator role in the illegal activity, will not qualify for immunity. However, corporations or individuals which were "co-leaders" or "co-instigators" of the illegal activity, as opposed to having been *the* leader or *the* instigator of the illegal activity, will be eligible for immunity, subject to meeting the other requirements of the Immunity Program.

In determining whether an immunity applicant was the leader or the instigator of the illegal activity, the Bureau and the Attorney General will review and assess all facts obtained at the time the immunity is requested by the party and during the course of the investigation. For example, if during the course of an investigation it is determined that a corporation coerced or threatened another corporation to participate in a cartel or that a corporation was the instigator in establishing a cartel, the corporation will not qualify for immunity.

30. What previous offences must be disclosed?

Paragraph 16 of the Bulletin provides that "throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete and timely cooperation". In particular paragraph 16(a) requires that "the party must reveal any and all offences in which it may have been involved." A number of questions have arisen regarding what an applicant is required to disclose pursuant to this provision.

The Bureau requires immunity applicants to disclose all criminal competition offences under the Act, of

which they are aware, relating to any product. Applicants will be expected to exercise reasonable due diligence in determining whether they have been involved in other criminal competition offences. Disclosure of the offences should be made as soon as possible after an immunity application and in any event will be required before the Bureau recommends that the Attorney General sign an immunity agreement with the applicant. The Immunity and Immunity Plus programs may apply to the additionally disclosed conduct.

Applicants should also anticipate that the Attorney General will ask them about any criminal activity, under any legislation, that can reasonably be expected to impact their credibility as a witness. Before offering immunity it is essential that Crown counsel be satisfied that the applicant has disclosed all the information likely to affect its credibility. Such disclosure may relate to criminal activity in Canada or abroad.

Paragraph 16(b) of the Bulletin requires parties to provide full, frank and truthful disclosure and prohibits misrepresentation of any material facts. A party who provides false or misleading information to the Bureau in the context of an immunity application and performance of related obligations can be disqualified as ineligible for immunity and face revocation of a PGI or immunity agreement. It could also face a criminal charge of obstructing a Bureau inquiry or examination under section 64 of the Act. Providing false or misleading information under oath can lead to charges, including perjury or obstruction, under Canada's *Criminal Code*. Applicants remain at risk of being prosecuted for any undisclosed criminal offences.

31. What is Immunity Plus?

Parties which are not first to disclose conduct to the Bureau may nonetheless qualify for immunity if they are first to disclose information relating to another offence. This concept is known as "Immunity Plus". Immunity Plus may be available in situations such as the following: Company ABC is not the first to disclose the pencils cartel to the Bureau and therefore does not qualify for immunity for pencils. However, ABC does disclose information relating to a different offence unknown to the Bureau, one involving a different product, for example, a cartel with respect to erasers.

ABC will be granted immunity for the cartel on erasers, subject to compliance with the requirements outlined in the Immunity Program. If ABC pleads guilty to the cartel related to pencils, the value of ABC's contribution to the investigation of the pencils cartel and the disclosing of the eraser cartel will be recognized by the prosecution in its sentencing recommendation with respect to the pencils cartel.

Immunity Plus encourages subjects of ongoing investigations to consider whether they may qualify for immunity in other markets where they compete. Although a company may not qualify for immunity for the initial matter under investigation, the value of its assistance in a second matter can lead to immunity for the second offence and a substantial reduction (the “plus”) in the calculation of the fine for its

participation in the first offence. Immunity Plus is aimed at encouraging companies already under investigation to report the full extent of their illegal activities and put all competition law matters behind them.

32. Will information provided by an immunity applicant be disclosed to the public?

The Bureau treats the identity of an immunity applicant and any information obtained from that applicant as confidential. Paragraph 33 of the Bulletin states that the only exceptions to this policy are the following:

a) when there has been public disclosure by the party;
b) when the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act;
c) when disclosure is required by law; and
d) when disclosure is necessary to prevent the commission of a serious criminal offence.

These exceptions currently are the subject of review and should be discussed with the Bureau early in the process.

Questions have been raised as to whether the Bureau will disclose information provided by an immunity applicant to other enforcement agencies or to a foreign jurisdiction. The Bureau will not share the identity of an immunity applicant, or the information provided, with other enforcement agencies or a foreign agency, unless the immunity applicant provides a waiver giving the Bureau permission to do so.

It is important to note that this confidentiality protection is an added benefit to being the "first-in" under the Immunity Program.

However, where a company has not applied for or does not qualify for immunity, to the extent that disclosure to a foreign agency is permissible by law, the Bureau will not agree to conditions in plea agreements which limit its disclosure to another anti-trust agency. To strengthen its ability to address cross-border conduct aimed at Canadian markets, Canada has entered into international agreements which provide for mutual legal assistance among anti-trust enforcement agencies world-wide. These agreements generally provide that information may be exchanged, subject to domestic laws. Agreeing to conditions which limit the disclosure of information to other agencies would cast a doubt on our commitment to cooperate with other enforcement agencies. More importantly, such conditions could hamper our cooperation efforts in all of our cross-border cases.

33. Can foreign counsel represent immunity applicants before the Bureau or must a Canadian lawyer be involved?

Typically a Canadian lawyer represents the applicant in its dealings with the Bureau although foreign

counsel may be present at certain meetings. When in Canada, foreign counsel must ensure that they are acting in accordance with the requirements of the relevant provincial bar association.

Anyone wishing to apply under the Commissioner's Immunity Program may contact:

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