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Ms. Erica Schumacher  
Criminal Matters Branch  
Competition Bureau  
Place du Portage 1  
50 Victoria Street  
Gatineau QC K1A 0C9

Dear Ms. Schumacher:

Attached are Alberta Government Services' responses to the questions in the Competition Bureau's Immunity Program public consultation.

Sincerely,



Laurie Beveridge  
Assistant Deputy Minister

Attachment

## ATTACHMENT

### Competition Bureau

Immunity Program Review Consultation Paper  
February 2006

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#### Topics for Consultation

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##### 1. Confidentiality

###### Questions

- 1.1 *How should the Bureau best balance the interest of immunity applicants that their identities and information remain confidential, with court decisions that information in pre-charge court documents, such as ITOs, be public?*

Answer:

- The Bureau should consider the UK model.
- It may be possible to assign a reference/ID number to the immunity applicant and refer to the applicant only by that code number in any court paperwork.

- 1.2 *Are there concerns with immunity applicants being named in court documents if they are not identified as immunity applicants, but rather as participants to the conspiracy?*

Answer:

- This could have an unintended adverse impact on the applicant's reputation and credibility in the business world.

- 1.3 *Are there concerns regarding confidentiality and information sharing among competition authorities? Are there specific concerns with any particular agencies? Please provide detail.*

Answer:

- This question is outside our area of expertise.

## 2. Oral Applications – The Paperless Process

### Questions

- 2.1 *Does the Bureau's paperless process, as it is described above, address the concerns of immunity applicants facing potential civil liability in other jurisdictions?*

Answer:

- This question is a legal question.
  - Aren't Bureau officer notebooks discoverable?
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- 2.2 *Are certain communications less problematic than others if reduced to writing (e.g. letter from the Bureau confirming a marker; letter from an applicant providing a waiver of confidentiality; letters relating to the failure of an applicant to meet Program requirements; notice in respect of revocation of a marker)?*

Answer:

- Some communications may be less problematic for the immunity applicant than others, but they're going to pose a problem nonetheless with respect to risk of exposure to potential litigation.

- 2.3 *Are there best practices you would endorse for a paperless process that would address applicants' disclosure concerns and the Bureau's interest in avoiding misunderstandings in the communications that take place? If yes, please identify.*

Answer:

- The likelihood of miscommunication increases exponentially when all communication is oral.
- Use code numbers to keep the applicant's identity secret.
- A paperless process raises accuracy issues, given potential staff turnover and the potential for cases to become lengthy. Would the credibility of the information be eroded over time?

- 2.4 *Are your disclosure concerns differentiated as between domestic and international case enforcement?*

Answer:

- Our concerns are not different. However, enforcement may be limited by international laws.

- Document recovery may be dictated by legislative processes and court rulings with respect to Bureau officer note books.
- 2.5 *What fora do you see as the most effective for developing best practices for the paperless process? ICN? OECD? Other?*

Answer:

- The OECD is recognized as one of the world's top authorities on developing best practices. However, we lack sufficient knowledge of the ICN and OECD to be able to make an informed comparison.

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### 3. Role in the Offence

#### Questions

- 3.1 *Should leaders/instigators of an offence be denied immunity?*

Answer:

- Yes. This appears to be the Bureau's practice at the present time.
- Caution should be exercised. For instance, a cartel may be instigated by a small player, then grow to epic and outrageous proportions with more powerful, devious persons taking control.

- 3.2 *Should specific criteria be used to determine if a corporation is "the" leader or "the" instigator of a cartel and if so, what should those criteria be?*

Answer:

- This should be addressed on a case-by-case basis.

- 3.3 *How important is the element of "coercion" as a criteria for denying eligibility to the Program? Should it be the only criteria?*

Answer:

- Coercion should be considered a very important criterion, though not the sole criterion. It should be kept in mind, though, that the person who engages in coercion may be under coercion himself.
- The U.S. approach, as outlined on page 19 of the Consultation Paper appears reasonable.

- 3.4 *How should the Bureau balance the benefit to enforcement of valuable information and evidence against the interest of pursuing charges against the driving participants of the offence?*

Answer:

- This should be addressed on a case-by-case basis.
- The U.S. approach appears reasonable.

- 3.5 *Are there circumstances under which a cartel participant, who is the sole beneficiary of the activity in Canada, should be eligible for immunity? Please comment.*

Answer:

- Yes. One example would be a huge international cartel that conducts only a small portion of its business in Canada. It would be in the international community's overall best interest to grant immunity to the business operating in Canada in return for information that can be used to prosecute the cartel.

- 3.6 *Should the Bureau specify the criteria used to determine if an applicant is the sole beneficiary of the activity in Canada? What should those criteria be?*

Answer:

- Such criteria should be developed and details should be publicly available.

#### **4. Coverage of Directors, Officers and Employees**

##### *Questions*

- 4.1 *Should standard criteria be developed to determine when past directors, officers and employees will be eligible for immunity under the umbrella of their former employer's immunity? What factors should the Bureau consider in developing criteria?*

Answer:

- The Bureau already appears to have such criteria, as outlined at the bottom of page 21 of the Consultation Paper. This approach appears adequate.

- 4.2 *Should a company's obligation under the Program to promote the continuing cooperation of past directors, officers and employees who are covered by its immunity parallel those applicable to current directors, officers and employees? If not, how should they differ?*

Answer:

- The company's obligation to promote cooperation with the Bureau should be the same with past directors, officers and staff as with current directors, officers and staff.

- 4.3 *Are carve-outs appropriate and, if so, when?*

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Answer:

- Yes. Outrageous, obstructive or coercive behavior should qualify the perpetrator for being singled out in this manner.

- 4.4 *Does this approach detract from the predictability of the Program?*

Answer:

- No.
- A company or individual has the option of canvassing this issue anonymously with the Bureau through legal counsel.

- 4.5 *What criteria should be used when deciding whether to "carve out" an individual?*

Answer:

- See response to 4.3

- 4.6 *How should the Bureau address matters of apparent conflict of interest in respect of applicants?*

Answer:

- The Bureau should advise all parties to have their own separate, independent legal counsel.

- 4.7 *Are there circumstances where corporate counsel should be permitted to attend interviews of individuals who they do not represent and who are not covered under the umbrella of corporate immunity?*

Answer:

- No, unless the individual has granted his or her consent. Such individuals are entitled to the protection of privacy law.

## 5. Penalty Plus

### Questions

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- 5.1 *Should the Bureau adopt a "Penalty Plus" program, similar to that used by the U.S. DOJ?*

Answer:

- No. This is unnecessary because immunity can be revoked if the applicant fails to disclose other offences.

- 5.2 *How much of an increase (either pecuniary, or custodial in the case of individuals) would be appropriate, and on what basis?*

Answer:

- N/A

## 6. Restitution

### Questions

- 6.1 *Is restitution an appropriate requirement for eligibility under the Program?*

Answer:

- Yes, provided that ways can be found to identify who the victims were. One approach might be to create a new prosecution mechanism, for Bureau usage, that would employ the procedures of a civil court class action suit.

- 6.2 *How can it best be ensured that victims of the offence are accurately identified and that restitution is appropriately assessed?*

Answer:

- See response to 6.1



- 6.3 *Should alternative arrangements be made with applicants in cases where victims are not identifiable or the amounts cannot properly be assessed? Please identify suggested alternative arrangements.*

Answer:

- See response to 6.1

- 6.4 *Are there situations in which restitution should be excused? If yes, please identify.*

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Answer:

- See response to 6.1. This should be addressed on a case-by-case basis.

- 6.5 *Is restitution a matter better handled between the parties themselves, either privately or through civil action?*

Answer:

- See response to 6.1. It should be kept in mind that it can take many years to bring a lawsuit to trial.
- This should be addressed on a case-by-case basis.

## **7. Revocation of Immunity**

### *Questions*

- 7.1 *What factors should the Bureau take into account in assessing whether a breach of an immunity agreement is sufficient to warrant revocation?*

Answer:

- Materiality, lack of cooperation, giving false information.

7.2 Are there limits to a company's ability to secure the co-operation of its directors, officers and employees that should be recognized by the Bureau?

Answer:

- Yes. However, the company must show it made its best efforts to secure the cooperation.
- It should be kept in mind that individuals who refuse to cooperate do not qualify for immunity.

7.3 How should the bureau treat individuals covered by an immunity agreement between the Attorney General and their company where their company's agreement is revoked?

Answer:

- In such instances, individuals and their company should be treated separately and these individuals should continue to have immunity.

7.4 What procedural steps should the Bureau follow before making a recommendation for the revocation of immunity?

Answer:

- The UK uses what appears to be a reasonable approach. (page 30, Consultation Paper)

7.5 Are there any other concerns the Bureau should be aware of in respect of its investigation or prosecution of applicants whose immunity has been revoked?

Answer:

- The Bureau should consider the risk of countersuit if it turns out that there were insufficient grounds for revocation.
- The rules of evidence may be a concern.

## 8. Creation of a Formal Leniency Program

8.1 When should leniency be available and under what terms?

Answer:

- The extent of involvement in the masterminding of the cartel should be taken into account.

8.2 *What criteria should be considered in determining the degree of leniency recommended by the Bureau to the Attorney General?*

Answer:

- The criteria on page 32 of the Consultation Paper appear reasonable.

8.3 *Under what circumstances, and based on what incentives, would a party be most likely to co-operate with the Bureau in return for leniency?*

Answer:

- The degree to which the penalties are reduced would be a prime motivating factor
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8.4 *How should different levels of incentives for co-operating parties be approached?*

Answer:

- First-in receives full immunity; subsequent comers can seek leniency. Cases that qualify for less than full immunity should be addressed on a case-by-case basis.

## **9. Pro-active Immunity**

9.1 *Should the Bureau consider initiating approaches to potential immunity applicants during the course of an investigation if it has some reason to believe that a party might be eligible to apply under the Program? If your answer is 'yes,' under what circumstances should such an approach be made?*

Answer:

- Soliciting information with the promise of immunity could taint any evidence that such an agreement makes available. The Bureau also could be confronted with Charter issues.

9.2 *Do matters of fairness arise with respect to which parties the Bureau may choose to approach or when it chooses to make the approach? How should they be addressed?*

Answer:

- Charter issues may arise.

9.3 *If a party requests a marker, is denied because it is not first-in and then decides not to co-operate further, should the Bureau subsequently contact that party if the first-in application fails?*

Answer:

- No. The quality of evidence from a previously spurned applicant may not be adequately high. The fact remains that the party wasn't first-in, and the program's "first-in" doctrine should be left intact as an incentive to turn over a new leaf at the earliest possible time.