

Ministry of
Government Services

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By Email: schumacher.ERICA@bc-cb.gc.ca

Ms. Erica Schumacher
Criminal Matters Branch
Competition Bureau
Place du Portage I
50 Victoria Street
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Dear Ms. Schumacher:

Thank you for the opportunity to comment on the Immunity Program Review. Please accept these comments on behalf of the Ontario Ministry of Government Services.

We support the Immunity Program as a proven approach worthy of continuing and improving. The objective of encouraging early defection from participation in illegal conduct involving multiple offenders is worth pursuing.

Due to the Ministry's consumer protection mandate, these comments focus in particular on issues regarding Restitution, under Section 6 of the Paper. The Ontario Ministry of the Attorney General may also submit comments in respect of related issues.

In our responses to the questions posed regarding restitution, our interest is in particular consumer victims.

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

Yes, restitution is an appropriate requirement for eligibility. Some form of the current policy's requirement should be retained, that being, "*Where possible, the party will make restitution for the illegal activity*".

Lack of an offender's commitment to restitution calls into question whether the offender is deserving of leniency.

We acknowledge that expectation of this expense might deter some applicants, and to that extent result in offences continuing to greater public harm. However, the alternative of accepting the lack of restitution and the retention of proceeds from illegal activity is not acceptable. This alternative would condone the very outcome the law exists to prevent. There are circumstances in which it is acceptable to forgo applying penalties in the interest of the larger public benefit from detecting and halting criminal activity, but not to accept harm to victims.

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

An offender should be obligated to participate fully in any program to identify victims as a condition of immunity, and to fund associated costs. For example, the Bureau could be given the option to require an applicant agree to pay the Bureau its forensic accounting costs or that an independent accounting firm selected by the Bureau and paid by the applicant will produce an accounting of victims and payment of restitution.

The Bureau should also be able to require the offender agree that the issue of restitution, if requiring case by case determination, be resolved by use of an alternative dispute resolution process lying within the Bureau's discretion and at the offender's cost, rather than leaving the matter to be resolved by the civil justice system. This is not to say the Bureau should have the authority to give up the ability of parties with rights of action to pursue them. The offender's restitution to private parties should be "unconditional" in this sense.

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.

Where restitution is not feasible (e.g., the parties to receive it are prohibitively expensive to identify), an alternative but broadly consistent use of those funds should be required. Retention of such gains should not be accepted as the consequence of their distribution as restitution being impracticable.

Alternative uses of funds could include donations to charitable and non-profit entities with an established record of acting on behalf of or to educate the 'marketplace community' to which the victims belonged (e.g., a telecommunications firm could be required to donate funds to consumer advocacy groups active in this policy field).

The Bureau might, alternatively, channel such funds through existing public interest disbursement mechanisms for the sake of efficiency (e.g., Industry Canada's Office of Consumer Affairs consumer grants program, in which case any such funds should be in addition to those already made available to the program not as a replacement for them).

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

The referenced U.S. Department of Justice (DOJ) guidelines provide a reasonable approach to where consideration should be given to excusing restitution. We do have comments on some of the specific situations they outline.

We suggest restitution serves two goals: restoring losses to victims and simultaneously confiscating improper gains. Even where the first objective cannot be met, the second should still be met. An appropriate recipient of leniency does not seek to retain the benefit of their illegal conduct. If an enforcement agency knowingly permits that outcome, the public's confidence in the law is undermined.

That said, if as a practical matter, the offender could never be forced to make restitution, the inability to make it should not be a bar to participation in the program (e.g., the offender is bankrupt as set out in the DOJ guidelines). This would be subject to a caveat that an offender that had intentionally placed itself in such a position in order to be "judgment proof" may well be a much less appropriate recipient of immunity.

If there was only one victim and that victim not available to be compensated, this should be considered a reason to seek alternate use of the funds not to forgive restitution entirely.

If accepting an offender's lack of funds as a reason to forego restitution, the Bureau may wish to consider the most efficient approach to encourage full disclosure in such cases and address any deception. If forfeiture of immunity and prosecution is most efficient that is appropriate. You may wish to consider the use of "avalanche clauses" such as some U.S. enforcement agencies employ (e.g., the Federal Trade Commission). An avalanche clause generally states that an even larger greater monetary judgment will become due and payable in the event a subject has materially misrepresented their financial condition.

The immunity program should not give rise to any excuse of civil liability. Victims and others with rights of action must retain those rights. Assuming the offender is not an instigator or leader in the offence, there may still be victims whose only right of action is against this offender. From the perspective of these victims, this offender's continued viability or corporate existence may be of no value and their only concern would be, legitimately, the recovery of as much of their loss as possible.

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

Restitution should remain a key aspect of the program. As indicated above, it is a critical factor in demonstrating worthiness of leniency.

Once a law enforcement or regulatory body is involved in processing information and considering action regarding an offence, there are also considerable efficiencies if that process also considers issues of restitution. The overall cost and expense to all parties will often be less than the overall costs if it leaves all compensation to civil courts. As noted above, the "transaction costs" of restitution should all fall on the offender and not on the enforcement agency to the extent this is possible.

Where the underlying law is one under which a conviction for an offence gives a court the authority to impose restitution, such as Criminal law or many regulatory statutes, it is reinforced that an adequate disposition of the matter without trial should also consider restitution.

It is our hope the Immunity Program will continue to seek restitution.

Thank you for the opportunity to comment. I would like to also take this opportunity to convey the Ministry's appreciation for the excellent working relationship our Consumer Protection program has had with the Competition Bureau, up to and including the present.

Sincerely,

ORIGINAL SIGNED

Barry Goodwin
Director, Policy Branch