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Competition Bureau Immunity Program Review

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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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 National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Competition Bureau
Immunity Program Review

INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its response to the Immunity Program Review Consultation Paper. The CBA Section supports the efforts of the Competition Bureau to solicit comment on its immunity program, an important aspect of enforcement of the criminal provisions of the Competition Act.

The Consultation Paper seeks comment on the following topics:

- Confidentiality
- Oral applications – the paperless process
- Role in the offence
- Coverage of directors, officers and employees
- "Penalty Plus"
- Restitution
- Revocation of immunity
- Creation of a formal leniency program; and
- Pro-active immunity

This submission will comment on each of those topics. As a preliminary note, however, the CBA Section agrees with the general statement at page 3 of the Consultation Paper:

> An effective program must provide certainty, clarity and priority for immunity applicants. As stated by the OECD, "...firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximize the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal', but also that the terms of the deal be as clear as possible at the outset.

The CBA Section endorses the view that the overriding objective of an immunity program is to contribute to the decision of a party to withdraw from a cartel, report it to the proper enforcement authority, and cooperate with enforcement activities. The key objective must be

to bring about the termination of the negative effects of anticompetitive agreements on the economy, and then to promote the detection, investigation and punishment of the participants in these offences. When parties make the decision to withdraw from a cartel, certainty and predictability are the dominant factors. The issues raised in the Consultation Paper should be examined with a view to improving the attractiveness of the Immunity Program and maximizing the incentives to cooperate with the Bureau. The CBA Section focuses on these factors in its responses to the issues raised by the Consultation Paper.

I. CONFIDENTIALITY

The Consultation Paper first considers the Bureau's position on the issue of confidentiality. In large part, this discussion reflects the approach taken by the Bureau in the Immunity Bulletin[1] and the October 2005 FAQs[2] (the FAQs). The most significant part of the general discussion involves the circumstances in which an immunity applicant's confidentiality will be maintained. The Bureau appears to take the position that the identity of an immunity applicant will be kept confidential for a period of time, typically until charges against other participants are laid or if disclosure of the applicant's identity is required by a Court in a judicial proceeding. At that time, the Bureau and the Attorney General will advise the applicant of the need for a waiver. The CBA Section notes that there is no guidance on how the Bureau distinguishes between "typical" and "non-typical" situations. Confirmation of what the Bureau believes is "non-typical" would be helpful and provide stakeholders with further certainty.

The Consultation Paper also considers the competing interest of public disclosure in the context of resorting to compulsory evidence gathering powers contained in the Act. The Consultation Paper states that the supporting materials will be drafted in a manner to protect the identity of the informant or, in the alternative, that the Court file be sealed. The CBA Section believes that the balance between protecting the identity of an applicant and ensuring adequate disclosure to the subjects of investigations is a fine one. The Bureau should not

[1] *Immunity Program Under the Competition Act*, Competition Bureau of Canada, available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1752&lg=e [Immunity Bulletin].

[2] Available at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&lg=e.

adopt an approach to confidentiality that does not reflect this balance. The CBA Section appreciates that protecting the identity of an immunity applicant is a critical issue in international investigations, both for the integrity of the Bureau's investigation and for maintaining the incentives that promote self-reporting of cartel participation. The concern of the CBA Section is how the Bureau resolves this tension, and whether its public position accurately reflects the limits of Canadian law[3].

Finally, the CBA Section observes that companies may have obligations at law (e.g. securities disclosure, audit or other requirements) that may require disclosure of a Provisional Guarantee of Immunity (PGI) or immunity agreement. The Immunity Program should not be structured in such a way as to force companies to choose between compliance with the terms of a grant of immunity or other obligations placed upon them. The policy adopted by the Bureau should recognize that those obligations exist and must be met. Measures to protect the confidentiality of the investigation can be adopted to accommodate other legal obligations of an immunity applicant, but an un-nuanced public requirement of absolute confidentiality may give an impression to the contrary, and thus create a disincentive to apply for immunity, particularly on the part of foreign parties.

Answers to Consultation 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?

In principle, the CBA Section agrees that the Bureau has a proper interest in protecting the identity of an immunity applicant from any disclosure without the consent of the applicant for as long as possible. Despite the importance of confidentiality to the immunity process, however, the Commissioner is bound by judicial authority, upholding the right of the subject of a criminal inquiry, to know the case against him or her. Indeed, as the Supreme Court of

[3] An example of how a court dealt with the need to strike a balance can be found in *Australian Competition & Consumer Commission v. Visy Industries*, [2006] FCA 136, a recent decision of the Federal Court of Australia. Visy Industries sought disclosure of documents held by the Australian Competition and Consumer Commission (the "ACCC") in order to defend against the ACCC's allegations of price fixing and market sharing. Amcor Limited, one of Visy's competitors that allegedly participated in the price fixing but gained immunity from the ACCC proceedings, objected to disclosure of certain documents, claiming that certain pricing and other information in the disputed documents was confidential. The Court rejected Amcor's submissions and ordered that the documents be disclosed, finding that it would not be possible for Visy to adequately deal with aspects of its defence without disclosure. Even if Amcor could cite confidentiality, this was outweighed by the centrality of the documents to the issues in the case.

Canada has suggested in *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 and subsequent cases, the ability of a government institution to maintain confidentiality of information is limited by the right of the accused to know the case that they must meet. As a result, the Commissioner's ability to maintain confidentiality over the identity of an applicant is firmly circumscribed by law.

The ability of a government entity to obtain sealing orders concerning investigative processes has been reduced as a result of the decisions of the Supreme Court of Canada in *R. v. Mentuck*, [2001] 3 S.C.R. 442 and *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188. Moreover, in the criminal context, section 487.3 of the *Criminal Code* restricts the Crown's ability to obtain sealing orders for *Criminal Code* warrants to circumstances where disclosure of the information would (i) compromise the identity of a confidential informant, (ii) compromise the nature and extent of an ongoing investigation, (iii) endanger a person engaged in particular intelligence gathering techniques and thereby prejudice future investigations,or (iv) prejudice the interests of an innocent person or for any other sufficient reason. Arguably, the same principles should apply to section 11 proceedings under the Act, as the Courts (and relevant provisions of the *Criminal Code*) have established the default position in favour of openness, save in extremely limited circumstances.

A related issue is the extent to which the Commissioner may rely upon privilege to protect the identity of an informant and the apparent perception of the Bureau (as expressed at page 10 of the Consultation Paper) that an immunity applicant may be characterized as a confidential informant. The Canadian law of informer privilege has developed almost exclusively in the context of drug prosecutions and related enforcement measures[4]. In this context, the general principles are clear, as established by the Supreme Court of Canada in *R. v. Scott*, [1990] 3 S.C.R. 979 and subsequent cases[5]. In the CBA Section's view, immunity applicants are rarely, if ever, confidential informants, as they are typically expected to testify at a contested hearing if the matter proceeds to that stage. Confidential status may be protected on other grounds. These grounds and, to the extent possible, the

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4 See also Chapter 36 of the Department of Justice, *Federal Prosecution Deskbook*, "Immunity Agreements" at 35.5 "The Decision to Offer Immunity", available at http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch35.html#35_5_7.

5 See also *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 where McLachlin, J. (as she then was) described the informer privilege as being of fundamental importance to the criminal justice system (at para. 10).

circumstances in which, and the period of time for which, immunity applications will remain confidential, should be clearly communicated to applicants.

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?

It goes without saying that neither the Commissioner, nor other parties, can take the risk of misleading a Court. Consequently, if there were circumstances in which naming immunity applicants, without noting that they were immunity applicants, could be misleading to the Court, it should not be done. If there are such circumstances of which the Bureau is aware, it would be helpful for the Consultation Paper to outline them, though the CBA Section is not aware of such circumstances. Absent such a situation, there should be no difficulty in principle with naming an applicant as a participant in a conspiracy, but not disclosing its status as an immunity applicant. In fact, naming all the other conspirators save the informant may indirectly identify the informant.

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

Information sharing among competition authorities has already been the subject of comment by the CBA Section in its response to the Bureau's Draft Information Bulletin on the Communication and Treatment of Information under the Competition Act (the Draft CTI Bulletin). Reference may be made to pages 8 to 11 of that document for a review of the types of concerns that such information sharing raises[6]. With respect to the second part of this question, the CBA Section does not believe it is appropriate to express any views about the performance of particular agencies (domestic or international), but believes the Commissioner will be well aware if any agencies are unsuitable as candidates for information exchange. Indeed, in its response to the Draft CTI Bulletin, the CBA Section noted the basic assurances that the Bureau should obtain from foreign agencies prior to the provision of information to such agencies.

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[6] The CBA Section's response to the Bureau's *Draft Information Bulletin on the Communication and Treatment of Information Under the Competition Act* can be found at: http://www.competitionbureau.gc.ca/PDFs/Infobulletin_cti_under%20Comp_Act.pdf.

II. ORAL IMMUNITY

The Consultation Paper refers to a number of issues that arise in connection with oral or "paperless" applications for immunity. A number of key principles should be acknowledged. The need for a paperless procedure derives largely, but not exclusively, from the risk of punitive civil claims (primarily in the U.S.) against the immunity applicant and others. The immunity applicant must voluntarily provide fully candid disclosure in support of its application that will present its conduct in the worst legal light. It will provide self-incriminating information at a level of detail that no other party will, in all probability, have to produce.

In particular, because no economic impact evidence will be produced to the U.S. enforcement agencies, the requirement to provide information on undueness in Canada is of particular concern in an international cartel investigation. The CBA Section considers that, other than pre-existing corporate records, an immunity applicant should not be required to create any document that could assist third parties in civil claims against it (or any subsequent cartel participant that may come forward). Nor should the Bureau send any documents to the immunity applicant that could have that effect. Discovery rules in Canada and the U.S. create a risk that any written communications with the Bureau will be compellable. Given these risks and their attendant consequences, immunity applicants should not be put in the position of having their work product, or derivatives from it, serve as a "road map" to potential claimants in Canada or other fora.

A fundamental policy interest is to ensure that an immunity applicant is not placed in a worse position, relative to other non-cooperating cartel participants, as a result of its decision to seek immunity. A requirement that places the applicant in such a position will dramatically diminish the incentive to cooperate and reduce the attractiveness of the Immunity Program. It appears that any written exchanges between the immunized party and the Bureau, and certainly any written material produced by that party to the Bureau, might be compellable in litigation in the U.S. and therefore have such an effect.

The CBA Section appreciates the Bureau's recognition of this reality and acknowledges the commitment of the Bureau in seeking to prevent disclosure of such materials[7]. The development of paperless procedures by the Bureau aims to protect the integrity of the Immunity Policy, and the approach set out in the Consultation Paper seems consistent with international best practices in this area to a very large degree[8].

To enhance that approach, the CBA Section would suggest the desirability of additional principles and accepted procedures. The CBA Section strongly supports the principle that an immunity applicant should not be required to create any "new" documents to advance its immunity application that might be treated as factual admissions. Further, the CBA Section suggests that, other than pre-existing corporate or individual records, the Bureau should not request nor send any written materials to the immunity applicant, unless there is no alternative. In any written communications with the immunity applicant, there should be no reference to any facts that may have originated with the immunity applicant or its associated individuals. If the Bureau considers it necessary to write to the immunity applicant, it would be preferable to do so through the Bureau's counsel. That would maintain privilege, where it applies, and would thus more closely approximate the dealings between an amnesty applicant and the U.S. Department of Justice (US DOJ).

Finally, the CBA Section considers that, in the absence of a contrary indication from the applicant, the only documents that need to be in writing are the PGI, witness protection letters, the ultimate immunity agreement and any formal revocation thereof. No other communications, including the granting or termination of a marker, necessarily need to be recorded in writing. There appears to be no reason to require any other matters that are clear and simple to be set out in a written exchange between the applicant and the Bureau. These include confirmation or termination of a marker, requests for extensions of the period in which to perfect a marker, waivers of confidentiality or any communication relating to the arrangements between the Bureau and the applicant for fulfillment of the applicant's obligations, such as scheduling interviews and the like. Other measures are available to

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7 *In re Vitamins Antitrust Litigation*, no. 99-179 (TFH) MDL No. 1285 (D.D.C. Dec. 8 2002).

8 Consultation Paper, page 15.

attest to the accuracy of a record of dealings between the Bureau and the immunity applicant.

The CBA Section believes that a letter relating to the termination of a marker is neither necessary nor desirable. Some members of the CBA Section consider that recent letters of this sort have contained unnecessary and undesirable language. If the Bureau concludes that such communications must be in writing, the CBA Section recommends the adoption of a standard form letter, as is the practice of the US DOJ. In the event that the Bureau is not inclined to implement standard form letters in such cases, the CBA Section believes that the Bureau should nonetheless consult with an applicant (who is in the best position to assess the detrimental effect of any communication) on the draft of any communications to it. While the Bureau has sometimes shown a willingness to do so, this process should be formalized in order to provide the necessary guarantees and transparency to potential applicants.

Answers to Consultation Questions

2.1 Does the Bureau's paperless process address the concerns of immunity applicants facing potential civil liability in other jurisdictions?

The Bureau's process is a close approximation of the practice of the US DOJ[9]. It goes a long way to meet the concerns about the creation of written records that may cause disproportionate prejudice to the applicant in civil claims in other jurisdictions[10]. However, the CBA Section believes that further efforts, outlined below, to implement a truly paperless procedure would be desirable.

2.2 Are certain communications less problematic than others if reduced to writing (e.g. letter from Bureau confirming marker; letter from applicant waiving confidentiality; letters relating to failure of applicant to meet Program requirements; notice of revocation of a marker)? If yes, please identify.

Any written communication should be restricted to essential elements, avoid communication of information that originated with or through the applicant, and be standardized to the extent possible. Communications in writing should be through counsel for the Bureau and

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[9] It also conforms with the practices of the U.K. and Australia.

[10] Note, for example, the practice in some jurisdictions such as Japan, where a written immunity application must be submitted to the JFTC.

counsel for the applicant, to maintain the applicability of privilege for the communication, where possible. Documents critical to the immunity process, such as a PGI or immunity agreement, witness protection letters or a notice of revocation thereof, should be in writing. No other written communications are strictly necessary and they should be avoided.

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.

Yes. (1) As indicated, all written communications should be between counsel for the Bureau and counsel for the applicant, to preserve privilege so far as possible. (2) No facts derived from the applicant should appear in any written communication emanating from the Bureau, if possible. While it may be necessary to record certain facts in PGIs or immunity agreements, that can usually be accomplished by general language and the communication is normally privileged, at least prior to laying charges and the crystallization of disclosure obligations on the part of the Crown. (3) Communications that can be given orally and recorded simultaneously and in the same manner by both parties, e.g. grant of a marker, waivers of confidentiality, and the like, should not be the subject of non-privileged written communications. (4) To the extent possible, documents should be standardized. The CBA Section would be pleased to contribute to the preparation of standard communications. (5) Effective and simultaneous record taking, in which both sides can ensure that the oral information has been accurately recorded, and an oral review of such information with the applicant's counsel, would promote accuracy and minimize misunderstandings.

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

No. Communications between an immunity applicant and the Bureau (as a public law enforcement agency) should not be used to the detriment of the applicant in any private proceedings, whether domestic or foreign, where that can be avoided. In practice, the immunity applicant is required to present its conduct in the worst possible light, interpreting potentially equivocal conduct as inculpatory. The Immunity Program's exclusive purpose should be to advance the public interest in criminal law enforcement. It distorts that objective and adversely affects the incentives to cooperate with the Bureau, if the fully candid communications of the applicant can be obtained by third parties and used against it

in private proceedings in Canada or abroad. While disclosure and privilege may vary from jurisdiction to jurisdiction, there is no principled basis for departing from the rule that an immunity applicant's work product and its derivatives deserve appropriate protection.

2.5 What fora do you see as the most effective for developing best practices for the paperless process? ICN? OECD? Other?

The CBA Section believes that the development of best practices for immunity applications by the Bureau should respond to the concerns that arise under Canadian law. However, it would be desirable to develop such practices in a manner that guards against disproportionately adverse outcomes for immunity applicants in other jurisdictions, primarily, at the present time, the U.S. From that perspective, the CBA Section believes that a bilateral process, either between the Bureau/Department of Justice and the CBA Section, or through a joint CBA/ABA consultation mechanism, would be most desirable and useful. With that additional input, the Bureau's interaction with other jurisdictions would be better informed. As a multilateral forum, the International Competition Network ("ICN") would be appropriate, especially with its inputs from other national Bar Associations.

III. ROLE IN THE OFFENCE

Unavailability of Immunity Where Sole Actor

As a preliminary matter, the CBA Section notes that although the Immunity Bulletin and the FAQs speak of applications for immunity from prosecution for criminal offences under the Act, the real focus of the Immunity Program is on conspiracies. Providing immunity to the first participant in a conspiracy to seek immunity allows the Bureau to learn of illegal conduct that had not previously been investigated (or in respect of which there had not previously been enough evidence to prosecute) and allows for prosecution of other participants in a multi-party offence. There appears to be no mechanism under the Immunity Program for a corporate or individual wrongdoer to confess to unilateral or single-party criminal conduct[11] and receive immunity from prosecution.

[11] While the Consultation Paper refers to misrepresentation as a common example where there is usually only one company involved in the offence, other criminal offences do not (necessarily) involve multi-party conduct (one example of such an offence is price maintenance).

While the CBA Section recognizes that there may be good policy reasons for declining to reward a confession by a grant of immunity, the treatment of a confessing wrongdoer to multi-party conduct (conspiracy) and a confessing wrongdoer to single party conduct (price maintenance, for example) is asymmetrical. This misalignment (as with several other aspects of the Immunity Program noted throughout this submission) highlights the need to articulate the consequences of self-reporting in terms of leniency that is not full immunity. While the CBA Section does not advocate full scale sentencing guidelines as in the U.S., it is important as a matter of transparency, consistency and fairness for the Bureau and the Attorney General to state their position and approach to companies or individuals who do not qualify for immunity but otherwise act responsibly in approaching the enforcement agencies and should thereby receive some form of leniency.

The "Leader or Instigator" Requirement

The Immunity Program is not available to the leader or instigator of criminal activity. As noted in the Consultation Paper, there is no bright line test for determining whether the immunity applicant was the leader or instigator of the activity. Indeed, the Bureau has modified its position on the leader or instigator question by expressly allowing "co-leaders" or "co-instigators" to qualify for immunity.

The CBA Section suggests that the requirement that the immunity applicant not be the leader or instigator of the conduct be removed as, in its view, this criteria is unworkable on a practical basis.

The CBA Section believes that replacing the leader or instigator disqualification with clear and unambiguous criteria for disqualification is a sound approach for several reasons. First, it is too difficult to articulate what constitutes leadership or instigation, leaving room for inconsistent approaches and lack of predictability for potential applicants[12]. Second, as noted in the Consultation Paper, the differences in approach between Canada and other jurisdictions leaves Canada in a position of being more stringent on this issue than some other countries. Given the international context in which immunity is often sought, it is

[12] Furthermore, there may be no practical mechanism for an applicant that is denied immunity on this basis to contest a determination by the Attorney General that it was the leader or instigator of criminal activity.

difficult to rationalize why this should be the case. Third, it is good public policy to refuse immunity to a company that improperly compels other companies to join in the illegal multi-party conduct. Fourth, the objectives of the Immunity Program (to halt the conduct and punish the criminals) are arguably met equally by a grant of immunity to the (difficult to define) leader or instigator as they are by a grant of immunity to a follower.

There will be very rare cases where it would shock the conscience of the court to grant immunity to a party that has engaged in particularly egregious conduct. The CBA Section suggests that the Bureau consider criteria to evaluate whether disqualification is merited. Careful thought should be given to the description of the disqualification: a description of what constitutes coercion could also be subject to imprecision and ambiguity. Conceptually, however, the disqualification should be limited to a party that has, through illegal or improper conduct, acted towards another party so as to force its compliance with the anticompetitive agreements.

The "Sole Beneficiary" Requirement

The Immunity Program does not permit a company that was the sole beneficiary of the illegal activity in Canada to qualify for immunity. As noted in the Consultation Paper, Canada is unique in having this disqualification. The disqualification stems from concern about the vulnerability of the Canadian economy to market allocation schemes, which would result in conspirators allocating Canada to single market participants.

For international market allocation schemes in which Canada is allocated to one firm, that sole beneficiary is likely to have operations in Canada and is the company with the real and substantial connection to Canada for jurisdictional purposes. Other co-conspirators in that scenario are less likely to operate in or have assets in Canada and will have a stronger basis to contest the jurisdiction of the criminal courts in the event of criminal charges. Thus, if the sole beneficiary is immunized in a market allocation scheme, the practical result may be that no one in Canada will be subject to prosecution[13].

[13] The Attorney General would presumably advance arguments that the impact of such a market allocation scheme and the role of a non-resident co-conspirator were sufficient to found jurisdiction in a Canadian Court, but the practical challenges in such a prosecution are significant.

To the knowledge of the CBA Section, only once in the history of the Immunity Program has an applicant has been denied immunity on the basis that it was the "sole beneficiary". It would be helpful for the Bureau to confirm whether that is in fact the case.

In the view of the CBA Section, the sole beneficiary disqualification should be removed. As with the "leader or instigator" prohibition, the misalignment of approach between different jurisdictions creates issues for companies seeking immunity in a coordinated fashion across several countries. The CBA Section believes the requirement that immunity applicants not be the sole beneficiaries is also inconsistent with the policy objectives of the Immunity Program.

Answers to Consultation Questions

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

The CBA Section advocates the deletion of the "leader or instigator" disqualification.

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?

The CBA Section does not believe that leaders or instigators should be disqualified. An immunity applicant that has engaged in conduct which would shock the conscience of the court, were it to be granted immunity, should not be granted immunity, but such situations will be extremely rare.

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

Although somewhat difficult to define, "coercion" as a concept would provide policy convergence with the eligibility criteria of other agencies. It therefore has the advantage of facilitating multi-jurisdictional immunity applications. To the degree that the disqualification is limited to an applicant that can be shown to have acted illegally or improperly to compel the compliance of others with an anti-competitive arrangement, a grant of immunity to such an applicant would bring the administration of the program into disrepute. The CBA Section believes that further consideration should be given to the description of coercion, and whether it should be the sole disqualifying criterion.

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?

The CBA Section believes that the fundamental objectives for the Bureau in dealing with cartel behaviour are to (i) unveil and halt the cartel, (ii) effectively investigate and prosecute the participants, and (iii) thereby achieve deterrence. Covert collusive conduct underlying the conspiracy offence is the most serious violation under the Act. In the CBA Section's view the substantial benefits accruing to the Bureau from discovery of these activities is sufficient to offset perceptions that those benefiting from the activity have also obtained immunity, provided they do not engage in clear, unambiguous coercion of others. Although immunity recipients escape criminal prosecution, there are significant costs in cooperating with the investigation. Furthermore, they are far less likely to escape being sued in multiple class actions and having to incur substantial losses in defending and (typically) settling such cases. These costs can sometimes exceed the potential Canadian criminal fine. The "driving participants" (to use the words of the Consultation Paper) are not getting off "scot-free" even with immunity from criminal prosecution.

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?

The CBA Section is of the view that the sole beneficiary disqualification for immunity applicants should be removed. If the disqualification is to remain, it should be narrowly defined so as to be triggered only with a pure market allocation scheme.

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?

See response to question 3.5.

IV. COVERAGE OF DIRECTORS, OFFICERS & EMPLOYEES

Extending Immunity to Employees

For the Bureau's Immunity Program to be credible, cooperating employees must obtain derivative immunity when a company is given immunity from prosecution. This approach creates appropriate incentives for a company to seek immunity and thereby maximizes the effectiveness of the Immunity Program. In the CBA Section's view, both current and former

employees should receive derivative immunity and the Bureau should refuse to provide immunity for employees only if such employees refuse to cooperate.

While the risk of individual personal exposure is real, individuals are often not as well situated as companies to evaluate the conduct involved (particularly in Canada, where market impact plays a large role in conspiracy cases) and to understand legal options. Companies faced with problematic conduct can and do retain legal counsel to investigate and evaluate, and are in a position to form the judgment that the Bureau should be approached about the conduct. In most cases, the company may not be able to pursue an immunity application without the cooperation of the individuals involved in the cartel. Providing immunity to individuals heightens the incentive to seek corporate immunity and meets the objectives of the program.

The CBA Section notes the quality of cooperation, particularly from former employees, may be somewhat variable. However, only clear refusal to cooperate should result in revocation of immunity.

Current versus Former Employees

The Immunity Bulletin, the FAQs and the Consultation Paper do not explain why there is a distinction between the approach to current and former employees. The Bureau states that in the case of past employees, it will consider the approach to immunity on a case-by-case basis, if they "offer to cooperate with the Bureau's investigation"[14]. No details are provided about what considerations might be applied to the analysis.

In the CBA Section's view, there is no principled basis to approach the immunity decision differently for past and current employees. If one accepts that companies act through people, and if the company admits to wrongdoing, makes disclosure, and commits to the immunity process, then all cooperating employees – past and present – should have the benefit of immunity, subject to particular circumstances. The CBA Section would expect

[14] Immunity Bulletin, para. 19.

that former employees would be denied the opportunity to receive immunity in return for cooperation only in very unusual and exceptional circumstances.

Carve-outs

Although the Bureau does not provide statistics, the CBA Section notes that the Bureau's approach is typically to extend immunity to company employees, absent unusual circumstances. The CBA Section believes that this is the proper approach: if immunity is given to the company, its past and current employees should be immunized. The only exception should be for employees (past or present) who do not cooperate.

One set of circumstances where the Bureau sometimes seeks carve-outs is in the context of international prosecutions where antitrust enforcers in other jurisdictions have also carved out particular employees and the Bureau seeks a consistent position. The CBA Section believes that there is no basis to carve out or exclude in Canada individuals who may have been excluded from immunity elsewhere, unless that employee is not cooperating.

There may be rare occasions in which individuals have engaged in other related criminal conduct, such as obstruction (whether under the Act or the *Criminal Code*). In such cases, the Bureau should have the ability to remove that individual from the corporate shelter of immunity and bring separate charges where they are otherwise warranted. However, in doing so, the Bureau would create an element of uncertainty in one of the critical underpinnings of the Immunity Program: the automatic grant of derivative immunity to employees of the immunity applicant. This type of conduct should be grounds for revocation of immunity if it occurs after the party's immunity application. But where the obstructive conduct precedes the application and is disclosed, individual immunity should nonetheless be automatic.

Answers to Consultation 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?

It is the CBA Section's view that employees should be eligible for immunity under the umbrella of the company's immunity. Further, there should be no distinction between the

approach taken to current and former employees. If immunity is not to be granted to employees, it should be only in the very limited circumstance of an employee (former or current) who refuses to cooperate with the Bureau's investigation. At present, the Bureau's approach according to the Immunity Bulletin seems to include present employees, but to exclude former employees unless they "offer to cooperate", when they will be considered on a case-by-case basis. No justification is offered for the difference in approach and, in the CBA Section's view, there should be none.

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?

The Consultation Paper refers to a company's obligation to "promote the continuing cooperation of past [employees]"[15]. The Immunity Bulletin itself mentions current and not former employees, though the Consultation Paper refers to obligations in respect of former employees, which is an extension of the actual language of the Immunity Bulletin[16]. On the language of the Immunity Bulletin, the corporate obligation arises in respect of current and not former employees, presumably as the latter do not automatically get derivative immunity.

Whether in respect of current or former employees, it is not unreasonable to require the corporate immunity recipient to take all lawful steps reasonably available to it to promote cooperation with the Bureau in its investigation. That said, the Bureau should recognize that the company is more limited in its ability to "promote" cooperation with past employees than with those who remain employed with the company. As a practical matter, the availability of immunity is itself usually a sufficient inducement to cooperation. The Bureau also needs to recognize that the steps that can be taken by a company in its "promotion" of cooperation may vary country by country in an international context.

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[15] Consultation Paper, p. 24. at question 4.2.

[16] It bears noting that the Immunity Bulletin itself states that "Companies must take all lawful measures to promote the continuing cooperation of **their** [employees] for the duration of the investigation and any ensuing prosecutions" (See Immunity Bulletin, para. 16(c)) and in the section regarding failure to comply with the requirements of the immunity agreement refers to the company's obligation to "fully promote the complete and timely cooperation of **its** employees" (See Immunity Bulletin, para. 27).

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

It is the CBA Section's view that the Bureau's approach should be to immunize all former and current employees who agree to cooperate. For the Bureau to automatically seek a carve-out simply because another antitrust enforcer has done so in another jurisdiction (typically the U.S.) should not be the practice.

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

Assuming that the approach referred to relates to the use of carve-outs, the CBA Section believes that if carve-outs are truly limited and reserved only for failure to cooperate, then the predictability of the Immunity Program will not be harmed.

4.5 What criteria should be considered when deciding whether to "carve out" an individual?

See above. Any carve-out of a cooperating employee of a corporate immunity applicant would be inconsistent with the Immunity Bulletin, as the CBA Section understands its operation, and would have a negative effect on the Bureau's Immunity Program.

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

The Consultation Paper refers to the potential for conflicts of interest where counsel acts for the company and also acts for former employees. Courts have recognized that "it cannot be presumed that lawyers will neglect or ignore their professional duties and obligations"[17]. The Bureau would do well to heed that admonition despite any concern it might have regarding representation and payment of legal fees.

In an immunity situation where all employees are willing to cooperate – assuming that the recommendation of the CBA Section is accepted – there will be no conflict between the interests of the company and its employees, as all will be immunized. In that case, concern about conflict arising from common representation does not arise.

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[17] *Law Society of Ireland v. Competition Authority*, [2005] I.E.H.C. 455 (High Court of Ireland).

In the absence of identity of interest, a conflict may arise not only in respect of former employees; the concern applies equally to current employees. Experienced defence counsel typically recommend that employees with a real possibility of individual exposure consult with (and retain, if advisable to the employee) independent counsel to advise the employees regarding the matter (including, presumably, of the existence of the Bureau's Immunity Program). For a variety of reasons, this practice should be followed by counsel advising a company in any circumstances in which criminal conduct may have taken place, if there is some doubt about whether immunity will be available.

The Consultation Paper raises a concern about the potential for conflict if the company pays for separate counsel. Assuming that the company is in a legal position to indemnify the employee, payment of legal costs incurred by an employee seeking independent legal advice should not – absent other circumstances – give rise to a conflict. Provided the sanctity of privilege is maintained and there is no attempt of any kind to influence the legal advice provided or the decision to be taken by the individual, payment of fees for independent counsel does not, in the CBA Section's view, in itself give rise to a conflict.

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?

In the CBA Section's view, for the Immunity Program to have credibility, all former and present employees who cooperate with the Bureau should be immunized under the umbrella of the company's immunity. In such circumstances, there is no reason to exclude company counsel from attendance at interviews of the current or former employee (on the consent of the employee); indeed, it would benefit the Bureau's enforcement objective to have company counsel present as they will be aware of the complete picture and relevant documentation, and can assist the individual and the Bureau in the interview.

V. PENALTY PLUS

The concept underlying "Penalty Plus" is borrowed from the US DOJ leniency policy and essentially means that an immunity applicant "…will suffer special, additional pain"[18] if it fails to disclose additional criminal antitrust conduct it is aware of in the course of its application. As a general proposition, it is not clear, under recognized sentencing principles, that a party that does not voluntarily disclose information about misconduct should be subjected to aggravated penalties for that conduct, merely because it has sought immunity or lenient treatment for its cooperation on other offences (i.e. why should such a party suffer more "pain" than a party that has also chosen not to disclose this particular offence?) As more fully discussed below, there are also troubling issues arising from misalignment of the Bureau's and the Attorney General's disclosure requirements under the immunity process.

Nevertheless, the CBA Section believes that the Bureau's adoption of a "Penalty Plus" program with comparable elements to that of the U.S. Antitrust Division could enhance the operation of the Immunity Program. It is reasonable to apply a harsher penalty for undisclosed cartel offences, treating the party as if it were a recidivist.

However, this is a matter of considerable complexity and the CBA Section believes that further consideration should be given to such an important policy issue. In particular, the CBA Section has two observations.

First, the CBA Section strongly opposes one crucial difference between the Bureau's approach and that of the US DOJ: the possibility that an applicant may have immunity revoked for the initial offence or product on non-disclosure of other antitrust conduct. The U.S. does not maintain this condition and the CBA Section believes that, excepting egregious conduct, following the provisional grant of immunity, revocation as punishment for non-disclosure is far too punitive, impractical, and would act as a disincentive for parties seeking immunity. Maintaining such an approach puts a potential immunity applicant in a position that could be significantly worse than a party that does not cooperate at all.

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[18] Gary R. Spratling and D. Jarrett Arp "The Status of International Cartel Enforcement Activity in the U.S. and Around the World", paper presented at American Bar Association Section of Antitrust Law Fall Forum 2005, Washington D.C., November 16, 2005, at 46.

Secondly, there is ambiguity between the Bureau and the Attorney General's respective requirements for disclosure of criminal offences that should be addressed in conjunction with the potential implementation of any "Penalty Plus" regime. The FAQs indicate that the Bureau will require applicants to disclose all criminal offences under the Act of which they are aware, and are expected to exercise "reasonable due diligence" in this determination[19]. However, the FAQs also add that an applicant must expect that the Attorney General may ask an applicant about "any criminal activity under any legislation" which could relate to criminal activity in Canada or abroad[20]. This latter practice is affirmed in the Federal Prosecution Deskbook, which notes:

> It is also essential that Crown counsel be satisfied that the information-provider has made full and candid disclosure of all information pertaining to the activity in question or likely to affect the credibility of the information-provider. Such disclosure may relate to criminal activity in Canada or abroad, over which the Attorney General of Canada lacks prosecutorial authority. The information-provider must be candid about such activity, but must be advised that the Attorney General of Canada cannot bind other prosecutorial authorities.[21]

Commentators have noted that this policy also differs sharply from the U.S. practice[22]. While public statements by Competition Law Division counsel have indicated that, in practice, the Division would align its policy with that of the Bureau[23], the need to provide transparency and predictability in this area can only be achieved through a formal alignment of the respective policies. First, the term "criminal activity" remains undefined and is itself imprecise. For example, does failure to comply with a domestic excise or revenue regime constitute "criminal activity"? Moreover, the CBA Section believes that requiring corporations to report "criminal activity" on a worldwide basis (which would be unique among regulators) would entail huge cost and time commitments and potentially expose applicants to both civil and criminal liabilities in other jurisdictions. The CBA Section believes that these factors would constitute substantial impediments to self-reporting and would blunt the overall objective of the immunity policy. The CBA Section therefore

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[19] *Ibid.*, at "30. What previous offences must be disclosed?"

[20] Ibid.

[21] Department of Justice, *Federal Prosecution Deskbook*, "Immunity Agreements" at 35.5 "The Decision to Offer Immunity", available at http://www.justice.gc.ca/en/dept/pub/fps/fpd/ch35.html#35_5_7.

[22] Gary R. Spratling and D. Jarrett Arp, *supra.* note 18 at 17-18.

[23] Remarks of Guy Pinsonnault, General Counsel, Industry Canada Competition Law Division at the Canadian Bar Association 2005 Annual Fall Conference on Competition Law, Gatineau QC, November 3, 2005.

believes that requiring applicants to disclose other cartel offences under the Act of which they are aware should prevail over any attempt to broaden disclosure so as to require worldwide compilation by an applicant of all "criminal activity".

With respect to individual witnesses, the CBA Section has no difficulty with a policy that would require them to provide, as a component of mandated criminal disclosure under Canadian law[24], any prior record of conviction for criminal offences in Canada. But other issues remain: given the requirements of section 45, an applicant may have well-founded concerns as to whether it has, in law, committed another offence, particularly upon the issue of the "undueness" test. "Easy" cases might make for straightforward application of this requirement, but this difficulty can arise even in so-called "per se" jurisdictions such as the U.S.[25] Given the negative implications of self-reporting criminal conduct (which could lead to civil antitrust violation claims in Canada or other jurisdictions[26]), an applicant, particularly a poorly-positioned one in terms of the "visibility" of the overall cartel, may well hesitate to come forward with supplemental disclosure on a marginal or equivocal case. With Canada's modified rule-of-reason approach to the conspiracy offence, the CBA Section believes that the dilemma for potential immunity applicants is clear.

In cases where an applicant is considering disclosure of other potential offences, but is uncertain as to whether an offence in Canada may have been committed, the Bureau should consider adopting a practice of permitting applicants to approach for confidential guidance in order to obtain the views of the Bureau on the issue. Such an approach would not be unique in the regulatory world, as the UK OFT permits applicants who are "thinking about applying for leniency" to approach it for purposes of obtaining comfort on an issue[27].

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[24] See *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C).

[25] See "The Challenges that Lie Ahead for the Amnesty Program", paper delivered to American Bar Association Section of Antitrust Law Fall Forum 2005, Washington D.C., November 16, 2005 by John M. Majoras, Washington D.C., at 5-7.

[26] John M. Majoras *ibid.* at 2: "The plaintiff's bar is quite willing to crank up the litigation machinery on nothing more than the announcement of an investigation, some boilerplate conspiracy language, and an allegation that prices are inflated."

[27] See the Office of Fair Trading's *Leniency and No-action*: *OFT's interim note on the handling of application* (July 2005) at para. 2.1 "Approach for confidential guidance".

On the issue of a penalty for non-disclosure of cartel offences in the course of an immunity application, the CBA Section believes that revocation is overly punitive, particularly when the Bureau and Attorney General would, as is the practice in the U.S., be able to seek a substantially harsher sentence on the second offence or product by stressing non-disclosure as an aggravating sentencing factor. As well, "undoing" the immunity process and launching a prosecution, particularly where substantial disclosure and enforcement/prosecution action may have ensued, would be problematic. Finally, initiating a revocation procedure would tend to reduce incentives for parties to come to the Bureau. In order to take advantage of the Bureau's Immunity Program, applicants would have to confess to criminal activity under other laws, for which there is no available immunity for self-reporting. Therefore, to seek immunity for a competition offence, the applicant would have to undertake a proactive, wide ranging and time consuming inquiry and then confess to any improper conduct that emerges. This inquiry would have to take place within the unrealistic timeframe of the Bureau's marker requirements, and continue throughout the cooperation period. This is a clear disincentive to taking advantage of the Immunity Program, given the unforeseeable consequences of having to find and then report misconduct, particularly when it is unclear if an offence has been committed.

This is not to say that revocation would not be permitted under any circumstances: the Federal Prosecution Deskbook provides criteria for determining whether immunity grants have been breached[28] and the CBA Section would recommend adoption of those criteria into a combined Bureau/Attorney General "Penalty Plus" program.

A thorough "Penalty Plus" program could also incorporate an "omnibus question"[29] as an invariable, stipulated procedure during witness interviews in the PGI process. If the Bureau adopts this practice, it should make a clear public statement to that effect, to put parties on notice that they are to make reasonable inquiries about any additional disclosures. However,

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[28] Department of Justice, *Federal Prosecution Deskbook*, "Immunity Agreements", *supra.* note 21 at 35.8 "Breach of Agreements".

[29] This question, which is routinely asked by U.S. Antitrust Division Attorneys either during witness depositions or grand jury proceedings, has been described as follows: "Do you have any information whatsoever, direct or indirect, relating to [description of conduct: e.g. price fixing, bid rigging, market allocation] with respect to other products in this industry or in any other industry?": Gary R. Spratling and D. Jarrett Arp, *supra.* note 18 at 10.

the CBA Section believes that punitive action under any "Penalty Plus" program, should be reserved for cases of willful or fault-based non-disclosure[30] on the part of the applicant, not mere negligence or oversight during its review process.

Answers to Consultation Questions

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

The CBA Section believes that the Bureau might adopt a "Penalty Plus" program with the same criteria as the U.S. Antitrust Division, but further consideration should be given to the specific features of the policy, in particular whether a defaulting applicant should be subject to harsher treatment for deliberate non-disclosure of a cartel offence of which it is aware. The CBA Section believes that revocation of immunity for the disclosed cartel conduct in such a situation is inappropriate. Before adopting a program, the Bureau and Attorney General should align their policies as discussed in this section and the Bureau should enunciate a practice of having its counsel ask the "omnibus question" of applicants during the PGI process. If revocation is considered in the case of non-disclosure of a second cartel offence, it should be considered only in the kinds of egregious circumstances outlined in the Federal Prosecution Deskbook. Mere negligence or error should not constitute grounds for punitive action; rather, a fault-based test of deliberate non-disclosure should be used in evaluating whether "Penalty Plus" sanctions should be imposed. The CBA Section would be happy to contribute to a fuller discussion of a "Penalty Plus" approach.

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

The CBA Section sees one essential problem with attempting to quantify particular levels of additional penalties for a "Penalty Plus" program is that there is no present quantifiable scale of penalties associated with the principal conspiracy and associated offences under the Act. In the U.S., for example, (and despite some lingering uncertainty about continuing judicial sanctioning of the Sentencing Guidelines), there is a measure of predictability arising from those guidelines: in cases where the Antitrust Division will employ a "Penalty Plus" approach, it will request that the court impose a term and conditions of probation and pursue

[30] This would be required under *Charter* principles associated with the fault requirement as a component of *mens rea* in criminal offences: see *R. v. DeSousa*, [1992] 2 S.C.R. 944

a fine or jail sentence at or above the upper end of the U.S. Sentencing Guidelines range; this fine could be as high as 80 per cent of the volume of affected commerce[31].

VI. RESTITUTION

Given the availability of follow-on civil claims pursuant to section 36 of the Act, there is no place for restitution as part of the Bureau's Immunity Program.

Answers to Consultation Questions

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

No. Damages are currently available to injured parties under section 36 of the Act, with well-developed class action procedures available to enable victims to assert their rights. The Bureau is not well placed to make decisions for plaintiffs who are able to make their own cost-benefit analysis in deciding whether to commence an action for damages for harm suffered under Part VI of the Act. There is no reason to think that in the absence of restitution, a successful immunity applicant will be permitted to keep ill-gotten gains. Neither will it eliminate subsequent civil actions. Moreover, forced restitution as a condition to a grant of immunity creates a disincentive for participation in immunity programs. It is presumably for these reasons that the Australian Competition & Consumer Commission chose to eliminate the restitution requirement from its immunity policy.

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

The CBA Section does not believe that the Bureau should even entertain the prospect of identifying and assessing restitution to "victims" of an offence. This is bad public policy and an inappropriate allocation of scarce enforcement resources given the availability of damages to private parties in section 36 follow-on cases[32].

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[31] See Gary R. Spratling and D. Jarrett Arp, *supra.* note 18 at 9-10 and Scott D. Hammond "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price on an Individual's Freedom?", address to National Institute on White Collar Crime, March 8 2001 at 7, available at http://www.usdoj.gov/atr/public/speeches/7647.htm.

[32] It is perhaps noteworthy to observe that in *R. v. Devgan* [1999] 44 O.R. (3d) 161, the Ontario Court of Appeal discussed the case of *R. v. Zelensky* (1978), 41 C.C.C. (2d) 97, a case decided under the provisions of former section 653(1) of the *Criminal Code* dealing with compensation orders. In *Devgan,* the court described guiding principles for the imposition of compensation orders outlined by Chief Justice Laskin in *Zelensky* and noted *inter alia* that compensation orders should not be used as a substitute for civil proceedings, and that Parliament did not intend that compensation orders would displace civil remedies necessary to ensure full compensation to victims.

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.

The CBA Section does not believe that restitution should remain part of the Immunity Program.

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

The CBA Section does not believe that restitution should remain part of the Immunity Program.

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

The CBA Section believes that existing rights of action in section 36, coupled with class action proceedings, are sufficient to permit compensation for injury suffered as a result of conduct contrary to Part VI of the Act.

VII. REVOCATION OF IMMUNITY

The Bureau's efforts to clarify an important area of uncertainty for immunity applicants and their counsel are a welcome step. Participants in a cartel may be inhibited from initiating an application for immunity if the criteria for revocation are unclear. If they hesitate to apply in one jurisdiction, they may be unable to move forward anywhere, and uncertainty anywhere is a drag on the potential success of immunity programs in Canada and other jurisdictions.

The practice of other agencies is broadly similar. The US DOJ has adopted criteria for revocation quite similar to those administered by the Bureau. However, it has been reticent to disqualify applicants and, with the single exception of Stolt-Neilsen[33], has never revoked a grant of conditional amnesty in a cartel case. There is no public information on whether and in what circumstances the US DOJ has withdrawn a marker. But the US DOJ has given considerable guidance to the public in the form of published speeches by senior officials. Any steps by the Bureau to clarify how it would approach any possible situation where

[33] Stolt Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. and Richard Wingfield v. United States of America, No. 05-1480 (United States Court of Appeals for the Third Circuit, 2006).

revocation is in issue is helpful not only for domestic cases, but to promote international predictability and coherence for immunity applicants.

A Preliminary Comment

The Consultation Paper does not seek views about the decision of the Bureau, announced in its FAQs, to establish a 30-day period within which a party that obtains a marker must perfect it with a proffer of evidence. Nonetheless, the CBA Section believes that the establishment of an arbitrary deadline for a party to perfect its marker is both unnecessary and counterproductive. In many, if not all, international cases, the party that obtains a marker will be unable to perfect it with a full application, containing the requisite information, within 30 days. If it can complete its application within the 30-day period, it may very well have to set inappropriate priorities among different cartel enforcement agencies, putting its Canadian internal investigation ahead of other areas where the cartel activity took place and the facts are found, and putting the Bureau ahead of more flexible agencies where the party's exposure may be greater. Moreover, coming forward with information that has been gathered in excessive haste may generate imprecise information and create difficulty for the applicant and for the integrity of the Bureau's analysis, at a later stage in the investigation. Often several interviews of key individuals are required to obtain a complete understanding of the facts. Finally, the requirement to develop information on the undueness aspect of the offence, a requirement that is imposed by no other enforcement agency in the world, injects an element of complex fact-finding that the CBA Section believes will never be properly accomplished in the time set out in the FAQs. Finally, the requirement may also increase the chances of revocation for failure to cooperate, insofar as an error or similar event might be construed as a failure to cooperate.

While a senior Bureau official has stated that the 30-day period may be extended[34], that guidance has not been published[35]. Moreover, because of the probability that an extension

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[34] Remarks of Denyse MacKenzie, Senior Deputy Commissioner of Competition, Industry Canada Competition Bureau – Criminal Matters Branch at the Canadian Bar Association 2005 Annual Fall Conference on Competition Law, Gatineau QC, November 4, 2005.

[35] Note, by contrast, the ACCC immunity policy which stipulates a 28-day time period for perfection, but observes that "…if…the applicant can satisfy the ACCC that its internal investigation will be complex, a longer period may be justified": *ACCC Immunity Policy for Cartel Conduct,* August 26, 2005, available at http://www.accc.gov.au/content/index.phtml/itemId/708758.

will be needed in most, if not all, international cases, the apparent exception becomes the rule. Foreign parties may not appreciate the availability of an extension, in the absence of published clarification, and may hesitate to come forward anywhere, until they can realistically expect to satisfy Canadian requirements. The CBA Section believes that a more flexible formulation of the need for parties to perfect a marker without unreasonable delay would be more realistic, more consistent with the criteria of other programs internationally, better reflective of the Bureau's actual practice, and as easily capable of enforcement if, in any particular case, the marker holder were inadequately prompt in meeting its obligations.

In any event, notwithstanding the 30-day period requirement, the Bureau appears to be under no corresponding obligation to make the immunity decision in a comparable timeframe.

Terminology

The language of the Consultation Paper blurs the differences between termination of a marker, which is in the hands of the Bureau, and revocation of a PGI by the Attorney General. The Consultation Paper uses language of uncertain effect. It speaks of "revocation" of a marker, but of a PGI merely "ceasing to be operative." If this denotes a differentiation between the two situations, the CBA Section believes it misstates the proper balance.

A marker simply reflects a pending application for immunity, by a party that has been given an opportunity to submit its application in priority to others. The marker will terminate if the marker holder fails to perfect its application, either according to the Bureau's time limits, because there is no evidence of an offence or because the applicant is ineligible under the Immunity Bulletin. From that perspective, there is nothing to "revoke" because nothing has been granted apart from recognition that the party was first to apply. Immunity, on the other hand, reflects a legal status, granted either conditionally or unconditionally by the Attorney General, following the application for immunity. The distinction is important because the legal rights of an applicant would be different, depending on whether it holds a marker, or immunity from prosecution. The CBA Section finds the apparent distinction between a decision to "revoke" a marker, and a recommendation that a "PGI be treated as inoperative" is confusing, if it is meaningful.

Revocation

The criteria in the Immunity Bulletin for the revocation of immunity are broad, as they must be, but the CBA Section believes two basic principles should be recognized. The first is that revocation of immunity from prosecution is a fundamentally important decision, both for the applicant and for the credibility and viability of the Immunity Program. The risk of revocation is consequently a matter on which there must be unequivocal clarity. The Consultation Paper articulates the seriousness with which the issue would be approached, but some aspects of the discussion are imprecise. No less stringent standard for revocation than serious and deliberate fault on the part of the party that has been granted immunity should be considered. A less cogent reason for revoking immunity would be legally vulnerable and raise questions as to the good faith of the Attorney General and the Bureau.

Unfortunately, given the importance of clear statements regarding revocation, the Consultation Paper may be interpreted to treat non-cooperation by company employees as a ground for considering revocation of the immunity of their employer. The Consultation Paper implies that an adverse inference about the cooperation of a corporate applicant might be drawn, depending on the "number and significance" of non-cooperating individuals and the steps taken to secure their cooperation. If a corporate applicant were unable to provide evidence about the essential elements of the offence because its individuals failed to cooperate, it should not lose its immunity unless it directly or indirectly encouraged or condoned the failure to cooperate. If the corporate applicant could not substantiate the offence without the assistance of non-cooperating individuals, the CBA Section believes the case would not likely involve revocation of immunity, but rather termination of a marker. In such a situation, the non-cooperation of all the knowledgeable individuals might imply that the corporate applicant could not provide information to substantiate the commission of the offence: by definition, it would not qualify for immunity.

But if it were able to provide sufficient evidence of the offence, even though key individuals chose not to cooperate, their non-cooperation should not be invoked to the detriment of the corporate applicant. If an individual ceases to cooperate after the grant of a marker or PGI, then the Bureau and the Attorney General could take steps to deal with that individual, without necessarily withdrawing the protection of the corporation. Secondly, the measures

available to an employer to promote cooperation by the relevant individuals should not be overestimated, particularly where the rights of the parties are determined by foreign systems of law. Anything less than proof that the corporation (or its management) condoned or acquiesced in the non-cooperation of key individuals is an inappropriate standard for assessing conformity with a cooperation agreement. It would be helpful for the Bureau to clarify that it would look for direct or indirect indicia of deliberate non-cooperation that is clearly attributable to the corporate applicant before considering a recommendation that the corporation was not providing “full, frank and truthful” cooperation.

The Bureau’s approach to revocation of immunity should be clearly aligned with the policy of the Attorney General. The approach of the Attorney General to the possible revocation of immunity is addressed in the Federal Prosecution Deskbook on a careful and rigorously fault-based evaluation[36]. The Bureau should reflect the same criteria in any consideration of revocation of immunity. The criteria in the Immunity Bulletin, particularly paragraph 27, are evidently fault-based. But the Bureau’s discussion is not clearly limited to considerations of personal fault by the party whose immunity is in issue.

The Consultation Paper cross-references the recent FAQs, and the timelines in particular. The CBA Section believes that the 30-day time limit for perfecting a marker is expressed inappropriately. To raise timelines in a discussion of revocation of immunity is controversial, unless the reference is to delays equivalent to a refusal to cooperate. Insistence on timing considerations in the Consultation Paper overstates the problems associated with delays. In any international case, the Bureau should be conscious that a failure to coordinate

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[36] The formulation of the *Federal Prosecution Deskbook* is considerably more rigorous, in providing as follows:

“ It may become necessary to seek a remedy against a person previously granted immunity where that person:

- withdraws promised co-operation with the Crown;
- fails to be truthful when testifying;
- has wilfully or recklessly misled the investigating agency or Crown counsel about material facts concerning the case including factors relevant to that person's reliability and credibility as a witness; or
- has sought immunity by conduct amounting to a fraud or an obstruction of justice.”

The FPS Deskbook goes on to say: “Whether the person should be indicted if this occurs, either for the offence for which he or she sought immunity or for some other offence, will depend on the circumstances of each case. However, the terms of the agreement with the person and the manner in which it was breached will be important considerations. In some circumstances, the laying of charges against the witness (or the recommencement of proceedings under subsection 579(2) of the *Criminal Code*) may amount to an abuse of the court's process”. See http://canada.justice.gc.ca/en/dept/pub/fps/fpd/ch35.html#35_8.

effectively with the immunized party in the fulfillment of its obligations to other agencies in other jurisdictions will create unnecessary pressures on the applicant, an avoidable risk of error and uncertainty on the part of those considering cooperation. Any uncertainty about the criteria on which a party might lose its immunity, especially after it may have provided self-incriminating evidence that might be used against it, undermines the incentives or delays decision making on whether to seek immunity in Canada and abroad.

The CBA Section believes that once an applicant has been granted a marker or a conditional grant of immunity, a mutually agreed process of cooperation should be adopted. If adjustments are required by the applicant during that process, the Bureau should assume they would not be lightly requested, particularly if the party is engaged in cooperation with other enforcement agencies. The Bureau should be willing to align the timing of its requirements with those of other enforcement agencies. Unless there is a threat of actual detriment to the investigation, the Bureau should be willing to accommodate a party seeking to assist multiple enforcers. Unless a delay in meeting obligations under a PGI is so serious, and persisted in after sufficient notice, that it clearly represents a corporate refusal to cooperate, revocation should not be considered and the Consultation Paper should avoid giving the contrary impression.

With regard to termination of involvement in the offence, the Bureau should clarify what is expected of a party reporting the offence to the Bureau. It is currently unclear that self-reporting without actively disengaging from a cartel is sufficient and, in light of Stolt-Neilsen, this is a key issue in all jurisdictions. The Bureau should facilitate self-reporting by treating an application as termination of participation in a conspiracy, so as not to alert other cartel members of the potential for an investigation. If the party must withdraw and self report, it is likely to preclude the possibility of a covert investigation. The policy of the Bureau should be fully aligned with that of the US DOJ, which treats self-reporting as tantamount to termination, at least until the US DOJ is in a position to determine further appropriate action. The Bureau's position is imprecise on this point and it would be desirable to clarify the matter.

Answers to Consultation 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?

The Bureau should take into account only clear evidence of deliberate and serious fault by the beneficiary of an immunity agreement itself. Criteria such as those outlined in the Attorney General's policy should the minimum requirements for a decision to recommend revocation of immunity, since the Attorney General will use those criteria in assessing the recommendation.

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?

Yes. A corporation applicant's lawyer does not necessarily represent directors and employees in their personal capacity. Their own counsel may advise them not to cooperate, with or without the knowledge of the company. In many legal systems, the corporation may not access records relating to individuals employed by the corporation without consent. In others, the corporation may not disclose such information without consent.

In some jurisdictions, failure by an individual to assist the corporation in an investigation into misconduct, or participation in conduct that is not an offence under local law, may not be used as grounds to sanction the individual under the relevant employment laws. This creates a risk of a party being confronted with incompatible legal requirements and the Bureau should not manage its program in a manner that would create such a risk. One possibility is to consider implementation of an ADR process into its immunity agreements which would enable the parties to seek to resolve disputes about whether a corporation is taking appropriate measures to promote the co-operation of its current or former employees; this could avoid the huge costs and prosecution and judicial resources associated with an automatic decision to revoke immunity and commence a prosecution upon such grounds. The CBA Section is prepared to work with the Bureau to investigate whether such a process would be feasible.

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?

The CBA Section believes that revocation of immunity is justified only in cases of conscious fault by the party that benefits from immunity. Individuals who are the beneficiaries of immunity to their corporate employer should not lose immunity by virtue of the fault of their employer, provided they continue to fulfill any cooperation requirements applicable to them.

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

The Bureau should satisfy itself that it has clear, admissible evidence of non-compliance with the substantive requirements of the party's obligations under its agreement with the Attorney General (the PGI or the immunity agreement). The Bureau should provide full notice of any deficiency to the immunized party and provide an effective opportunity to that party to respond. Anything less than scrupulous fairness and good faith in dealings with an immunized party not only leaves any decision vulnerable to challenge, but would threaten the credibility of the Immunity Program in the eyes of other parties.

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?

The Bureau's position on its ability to use evidence provided by a party pursuant to an immunity agreement that has been revoked is controversial. The Federal Prosecution Deskbook is more guarded on this point because the issue of revocation may raise questions of abuse of process. In the case of individuals, substantial issues arise where the Bureau would seek to use derivative evidence from the immunity process in a subsequent prosecution. At the very least, attempts by the Bureau to do so could lead to potential claims of abuse of process and judicial stays of proceedings. Such circumstances may justify a non-prosecution agreement, which underlines the significance of the underlying process associated with any decision to revoke immunity.

VIII. CREATION OF A FORMAL LENIENCY PROGRAM

The CBA Section believes that a variety of circumstances may account for the late arrival of an applicant to the immunity process, including ignorance of the Immunity Program or its

conditions, need to coordinate international activities with different regulatory agencies, conscious business decisions, delay, or circumstances beyond the applicant's control. In international cartel matters, a decision to approach regulatory agencies is seldom made solely on the basis of Canadian considerations. The timing and process of an approach to the Bureau will frequently be dictated by circumstances in other jurisdictions, chiefly the U.S., and to some degree, by the potential for individual criminal liability in Canada.

The objectives of the immunity program should seek to encourage cartel participants to come forward to resolve their exposure to prosecution in Canada, where they are unable to obtain immunity. Generally accepted sentencing principles support the reduction of penalties and other forms of lenient treatment by prosecutors and the Courts, in return for cooperation and a consensual guilty plea by parties involved in criminal misconduct. The CBA Section believes that parties should be enabled to assess the likely outcome of a criminal plea in a cartel case by a more formal and transparent leniency policy than is currently available to the public or the legal profession. By outlining its expectations for penalties against parties who do not qualify for immunity, the Bureau could create a level playing field for those parties and their lawyers, providing further incentives for them to come forward at an early stage to cooperate rather than litigate, following a grant of immunity, to resolve their criminal liability in Canada.

Unlike the U.S., where statutory sentencing guidelines provide reasonable transparency and predictability, Canada has no formal system for calculating fines and other penalties in cartel cases. The CBA Section acknowledges, however, that adopting penalty standards in the abstract with the degree of clarity that would promote early cooperation, is not free from difficulty.

The common law approach in cartel sentencing decisions has been to review a long list of sentencing factors, many of which are not easily assessable in advance. In recent years, the Bureau has sometimes made reference to an informal, percentage of commerce-based approach to proposed fines in cartel cases, and judges have often adopted jointly proposed fines calculated in part at least on the volume of Canadian commerce in the impacted product(s) over the duration of the cartel. While the Courts have generally accepted the

utility of considering sales levels during the offence as one appropriate benchmark in fine calculation, judges have also been reluctant to accept an unqualified "arithmetical" approach to the calculation of fines that do not properly incorporate reference to other relevant factors, including the aggravating and mitigating circumstances of the particular case. The CBA Section believes that if the Bureau does use volume of commerce-based criteria as a benchmark for recommending fines in cartel cases[37], the criteria should be publicly disclosed and exposed to public comment. At the very least, disclosure would enhance transparency and predictability in the leniency process, an important element of any effective formal program. As such, the principle that the earlier a party comes forward to resolve its exposure, the more lenient the proposed penalty, relative to later parties, would be an important incentive that supports those of the immunity program.

A specific aspect of this approach would focus on attracting parties to seek to be the second to apply. A non-recidivist corporate applicant that is second in, agrees to cooperate and has not engaged in coercion, obstruction, or other similar criminal conduct should receive a significant reduction of a given percentage off the fine that the Bureau would otherwise seek in light of the particular facts of that case. Present and former individual employees of the second party to come forward who cooperate fully should be eligible for a non-prosecution arrangement. If non-prosecution were inappropriate for individuals associated with the second-in party, for example by reason of coercion or obstruction, incarceration would not normally be sought, to create positive incentives to apply for leniency at the earliest time.

For third and later applicants, the Bureau may be less receptive to requests for leniency. Presumably, later arrivals would be subject to more stringent penalties, with smaller reductions from what the Bureau would seek in the absence of cooperation (possibly including fines, community service or incarceration of culpable individuals in the worst cases).

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[37] Various Bureau officials have, in some public statements, referred to an internal document setting out certain criteria and percentage proposals for applicants at various stages of the immunity and leniency process; however, the document has yet to assume any formal standing as representing Bureau and Attorney General policy on sentencing for the conspiracy offence.

This leniency regime is not a novel idea: other jurisdictions have taken up variations of the concept[38]. While the fine recommended in any specific case is the responsibility of the Attorney General, it would be open to the Bureau to make public its general expectation on the level of fines would support, relative to the sequence in which parties come forward. That would promote clarity of expectations and incentivizing parties to early resolution. These observations are only suggestions of a possible approach to leniency. In any event, some form of guidance should be created for consistency. The CBA Section would be pleased to contribute to the Bureau's thinking in this regard.

The CBA Section also believes that any leniency policy must also take into account policies in related areas, such as the Bureau's enunciated marker practice. In particular, the possibility (under the current enunciated policy) of a marker applicant losing its position due to its inability to demonstrate to the Bureau's satisfaction that an offence under section 45 of the Act (with the provision's requirement of proof of an undue lessening or prevention of competition) has indeed occurred. What is to be done with such a party who has approached the Bureau in good faith? Is subsequent prosecution, even with a leniency option, an appropriate course of action?

In such cases, the CBA Section believes that the Bureau should develop a policy which would consider the manifest unfairness (and potential legal abuse of process[39]) arising from prosecution of a good-faith "failed" immunity applicant. The policy could consider the use of non-prosecution arrangements for such parties. The Bureau should be mindful of the enormous damage to the immunity policy (and the resultant chilling effect upon potential applicants) through such an event, which is foreseeable under the current immunity policy.

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[38] See, for example, the European Commission's *Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 207 (2002/C 45/03) 19.2.2002* (available online at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf) which indicates that the first company to fulfill the conditions of the EC's partial leniency policy will receive a reduction of 30-50% of the fine which would otherwise have been imposed, the second successful applicant 20-30% and subsequent successful applicants will receive reductions of up to 20%; Japan and Korea also offer percentage discounts for second and later parties.

[39] See *R. v. O'Connor* [1995] 4 S.C.R. 411.

Answers to Consultation Questions

8.1 When should leniency be available and under what terms?

The CBA Section believes that leniency should be available to parties who fail to qualify for immunity or to later parties who approach the Bureau in good faith to resolve their criminal liability. However, the Bureau's present approach to sentencing in cartel and other offences does not lend itself to a quantifiable means of determining appropriate sentences for such parties. The Bureau should consider formal publication of its sentencing expectations, which should espouse the principle of incentives for early settlement.

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

As in other areas of this commentary, the CBA Section believes that the Bureau should use a principled approach in determining the degree of leniency, which should be recommended to the Attorney General. This approach should largely be fault-based and should attempt to reflect, as much as possible, the cooperation and timeliness the party has exhibited in its dealing with the Bureau. For example, where a non-recidivist party comes forward, after immunity has been granted, as the second party to seek to resolve its liability; and the second-in has not engaged in coercion, obstruction or other criminal conduct associated with the antitrust activity, it ought to obtain the lowest penalty of any subsequent party, whether expressed in terms of the percentage of its volume of commerce or another appropriate measure. The second-in should also receive a commitment of non-prosecution for all associated executives, officers, and employees, subject to providing complete and truthful cooperation to the Bureau and other relevant disqualifying factors, such as obstruction. Third-in and later parties should be subject to an escalating series of fines, together with the possibility of charges against implicated individuals. The CBA Section would be pleased to assist in further review of these issues by the Bureau and the Attorney General.

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

The CBA Section believes that parties are most likely to come forward and cooperate with the Bureau where there are (1) high levels of transparency and predictability on both the conditions associated with any proposed leniency policy and the manner in which it is

implemented, and (2) a predictable calculus for the penalties to which it may be subject. Those are not the only factors that a party will consider in deciding whether to come forward. The availability of possible defences and the implications for civil damages are factors that parties will take into account in any decision to participate in a leniency resolution that involves a guilty plea. But guidance from the Bureau on its penalty expectations will assist parties in a difficult decision when immunity is not available.

8.4 How should different levels of incentives for cooperating parties be approached?

Publicizing the Bureau's penalty expectation would be a good first step and the best manner of differentiating among cooperating parties in a leniency process. Given that the prime motivator for approaching antitrust regulators is increasingly the assessment of individual criminal liability, implementing an escalating series of penalties that would also involve individual charges would incentivize the immunity process and create the "race to the regulator" which is key to the success of all immunity policies. Having said that, the Bureau should be cognizant of the implications of its powers here and should use them responsibly. This "race to the regulator" pressure can create incentives to settle even where liability is not so clear and leave one or only a few with the prospect of either settling or contesting (which itself carries a huge cost). The fault principle should also be utilized to provide fair notice to parties that engaging in criminal conduct associated with the antitrust activity (such as coercion or threats against others or obstruction of justice) will disentitle the party to leniency considerations and may result in incarceration (and associated requests for extradition from other jurisdictions) for complicit executives, officers, and employees.

IX. PRO-ACTIVE IMMUNITY

In the Consultation Paper, the Bureau considers the adoption of "pro-active immunity", also known as "affirmative immunity". The Bureau would take a more interventionist role and, rather than waiting for the first-in-the-door to ask for immunity, it would seek out potential immunity applicants, going beyond the current practice of simply advising, during the course of an investigation and prior to having sufficient evidence to refer a matter to the Attorney General.

One of the concerns expressed in the Consultation Paper is that, while the Immunity Program is public and indeed well publicized by the Bureau, many people and businesses continue to be unaware of its content or potential relevance to their situation. Pro-active immunity would therefore be beneficial to targets who may not be aware of all their options while also serving the Bureau's interest in encouraging potential applicants to come forward and in enforcing the Act.

The Consultation Paper indicates that, while the Bureau does not typically seek out potential immunity applicants in cartel cases (except when meeting or communicating with those parties in the normal course of an investigation), it has used a pro-active immunity approach with potential immunity applicants in false and misleading representations and deceptive marketing practices cases on its own initiative outside the normal course of an investigation[40].

Under the current regime, a corporation can receive immunity or benefit from leniency from criminal prosecutions if it comes forward to report anticompetitive activity, agrees to cooperate with the Bureau and meets other conditions set out in the Immunity Program. As under the U.S. model, to receive immunity, a corporation must be the "first-in-the-door" to report anticompetitive activity and must agree to provide full disclosure and continuing cooperation to the Bureau. In other words, the applicant takes the active role.

The CBA Section notes that pro-active or affirmative immunity does not appear to be widely used by competition or antitrust agencies, and the immense success of existing immunity and leniency programs throughout the world indeed suggests that the "first-in-the-door" system may already give sufficient advantage to convince potential applicants to come forward. Given the success of immunity and leniency programs, one would tend to believe that agencies already manage to publicize their program quite efficiently.

There does not appear to be a wide consensus amongst competition and antitrust agencies on pro-active immunity. One related issue is that the Bureau must be mindful of the need to

[40] Consultation Paper, page 35.

coordinate immunity initiatives with commitments made by other jurisdictions. Difficulties and unfairness can arise if inconsistent positions are taken by different agencies. In addition, offers of pro-active immunity in Canada may be inconsistent with what is occurring in other jurisdictions.

As a general observation, however, the CBA Section believes that there may be circumstances where pro-active immunity is appropriate and further study may be called for.

Answers to Consultation Questions

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?

The Bureau should be free to inform a potential immunity applicant of the existence of the Immunity Program. The circumstances will turn on issues of fairness, as discussed below.

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?

In other criminal enforcement contexts, similar approaches are routinely taken. In choosing its approach, the Bureau must balance its investigative goals with the requirements of fairness. Important matters of fairness would arise with pro-active immunity in respect to which parties the Bureau may choose to approach or when it chooses to make the approach. This would put the Bureau in a very delicate position (given the significant benefits received by the immunity applicant). The CBA Section does not believe that advising a potential witness or informant of its options under the Immunity Program is unreasonable. Going further, whether through promises of immunity or threats of prosecution, is not appropriate, in the view of the CBA Section.

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

The CBA Section agrees that, if a party requests a marker, is denied because it is not "first-in-the-door" and then decides not to cooperate further, the Bureau could subsequently contact that party if the first-in application fails, as the party would have already come forward by itself, without intervention by the Bureau.

However, there is the possibility that a party may be denied a marker on other grounds. In such a case, it may have provided sufficient information to permit the Bureau to offer immunity on a pro-active basis to another party, with the possibility that the information could be used against the unsuccessful applicant. In this circumstance, it is fundamentally unfair for the initial party to be subject to prosecution. The Bureau should establish a policy that takes this into account and does not jeopardize the perception of its good faith or the predictability, and thus the attractiveness, of the Immunity Program.

The CBA Section believes that immunity and leniency should most definitely be available to parties who approach the Bureau in good faith to resolve their criminal liability, rather than to those "recruited" by the Bureau. The Bureau should use a principled approach in determining the scope and extent of its Immunity Program. Parties are most likely to come forward and cooperate with the Bureau where there are high levels of transparency and predictability on both the conditions associated with any proposed policy and the manner in which it is implemented.