

**COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW
IN RESPONSE TO
THE CANADIAN COMPETITION BUREAU
REQUEST FOR PUBLIC COMMENTS REGARDING ITS
DRAFT IMMUNITY AND LENIENCY PROGRAM UNDER THE *COMPETITION ACT***

July 9, 2018

The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law of the American Bar Association (the “Sections”) welcome again the opportunity to participate in the Canadian Competition Bureau’s (the “Bureau”) public consultation process on the Bureau’s Draft Immunity and Leniency Program under the *Competition Act* (“Draft Bulletin”). The views expressed in these comments are those of the Sections only and have been approved by the Sections’ Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Executive Summary

The Sections commend the Bureau’s continuing commitment to consult with a wide variety of stakeholders on proposed revisions to its immunity and leniency programs to increase transparency and predictability for users, but also to build momentum towards successful prosecutions of cartel offenses affecting Canadian consumers. The Sections have previously observed that the Bureau and its co-enforcement partner, the Director of Public Prosecutions (“DPP”), have experienced a general slowdown in cartel enforcement, in part, stemming from the Bureau’s and the DPP’s inability to quickly and successfully secure an immunity applicant in the investigative phase and then move to build pressure on others to convince second and third-ins to seek leniency. The Canadian anti-cartel enforcement regime, particularly as to international cartels, has been grinding very slowly, so this newly advanced comprehensive approach as described in the Draft Bulletin holds great promise and the Sections look forward to seeing the results.

As an overall initial comment, the Sections think it is a great advancement to combine the Immunity and Leniency Program descriptions in a single comprehensive document. That facilitates use by interested parties and it explicitly recognizes that leniency follows immunity. The Bureau and the DPP are aligned in the Draft Bulletin that just getting an immunity applicant is not enough; “success” means taking the cooperation of the immunity applicant and securing follow-on convictions of the rest of the conspirators. That is important and the combined Draft Bulletin reflects that reality. But, all is not perfect in the Draft Bulletin nor in the relationship between the Bureau and the DPP. In order to be truly useful to parties, the Draft Bulletin must clearly reflect a common commitment to its terms by both the Bureau and the DPP. There can be no daylight between the Bureau and the DPP on the terms and the process for granting immunity and leniency for qualified applicants. The Section believes the agencies are aligned but a clearer statement of mutual support and commitment is recommended.

The Draft Bulletin is another step forward for Canadian cartel enforcement in many important respects, but the Sections still believe there are areas of concern where we would recommend improvements. Because the Draft Bulletin also incorporates changes to the Leniency Program for the first time, the Sections also necessarily comment on that aspect of the Draft Bulletin. Positive developments in the Draft Bulletin include:

- Elimination of any suggestion that attorney proffers would be tape recorded
- Elimination of the requirement that witnesses be interviewed in person before the Interim Grant of Immunity (“IGI”) process concludes
- Elimination of the need to videotape witnesses at the earlier stages of any investigation
- Refinement of the definition of “coercer” with respects to immunity applicants
- Improvements in the process for the review of claimed attorney-client privileged documents
- Clarified processes and consent language regarding necessary disclosures by immunity applicants
- Expanded scope of employees that are automatically covered by the employer’s corporate immunity grant
- And, most significantly, the Sections applaud the decision by the Bureau and the DPP to abandon a two-step immunity process by continuing to use a simple and effective tool -- a conditional immunity agreement that governs behavior during the investigation and prosecution stage, with a final confirming immunity letter being issued to the applicant at the end of the Bureau and DPP investigation and prosecution.

The Sections describe below our suggestions for improvement in the Draft Bulletin on the following significant topics:¹

- The timeline for securing immunity and leniency appears lengthy and the process for securing the benefits under the Draft Bulletin remains burdensome in some respects.
- The Draft Bulletin lays out a format for rewarding corporate leniency applicants that have adopted or will adopt a robust compliance program. The Sections suggest some improvements for the Draft Bulletin in this regard.
- The Draft Bulletin recognizes that there may be collateral consequences flowing from obtaining immunity or leniency in Canada, particularly with respect to collateral consequences such as debarment. This briefing addresses the impact of procurement integrity programs on the Bureau’s and the DPP’s policies and procedures under their Immunity and Leniency Programs.
- The Draft Bulletin provides that Prohibition Orders will ordinarily be required to be entered into by leniency applicants. The Sections question the need for this requirement.
- The Draft Bulletin appears to suggest that “recidivism” may be a factor for the DPP in deciding whether to issue the IGI (See Paragraph 80).

¹ The Sections stand on its prior comments (January 2018) with respect to its disfavor of mandatory confidentiality waivers from immunity (and leniency) applicants regarding cooperation in other jurisdictions, the apparent requirement that the applicant disclose “all offenses,” and other specific, but lesser, comments on certain provisions in the initial Consultation Paper that remain unchanged or unaddressed in the Draft Bulletin.

1. Timeline and Process Issues

As noted in the Sections' January 2018 comments, we believe that in many cases it takes too long for the Bureau and the DPP to grant immunity (or to provide confirmation that immunity will be recommended). That forces the applicant to incur significant expense, and leaves the applicant exposed to prosecution risk throughout this lengthy period. In addition, the slow pace may ultimately make a successful prosecution more difficult, as over time memories fade and witnesses may become unavailable. Cost, delay, and uncertainty are three of the primary factors that may discourage companies from applying for leniency. We see aspects of the Draft Bulletin as continuing this lack of pace in this aspect of Canadian antitrust enforcement.

The Sections also recommend a far more collaborative process between the Bureau and the DPP at an earlier stage than is outlined in the Draft Bulletin, and that the agencies work jointly from the beginning to build their cases.

Finally, the Draft Bulletin does not adequately reflect the reality that many cartels are global, and that leniency applicants are increasingly being subjected to parallel demands from numerous enforcers. Our perception is that the costs and disruption associated with these demands have become so great that they are serving as a strong disincentive for companies to choose to cooperate with enforcement authorities. In the Sections' view, the Bureau's list of topics to be included in the proffer and the company's cooperation efforts continue this trend of imposing unnecessary burdens too early in the leniency process. The Sections believe that it is not reasonable nor necessary to require a Canadian immunity applicant to comply with the burdensome demands in Appendix 2 to secure conditional immunity from the Bureau and the DPP.

2. Compliance Program Credit -- Leniency Program

The Sections commend the Draft Bulletin for treating a credible and effective compliance program as a mitigating factor and as the basis for recommending an additional credit of up to 20% to the calculation of the recommended fine (See Paragraph 144). While the CCB has previously recognized the importance of incentivizing companies to create effective compliance programs, and stated in its June 3, 2015 Draft Bulletin on Corporate Compliance Programs that it would take a company's compliance program into account when making enforcement decisions, the Draft Bulletin goes further by putting a defined value on the possible reduction of the fine. This specific credit will provide a strong positive incentive for companies to invest in building and maintaining their competition compliance programs, and make it easier for compliance professionals and in-house lawyers to advocate for the allocation of sufficient resources for their programs.

The Sections note that because application of the credit pre-supposes admission of cartel conduct, the bare statement that credit will be only be given where the program was "credible and effective" could lead to uncertainty about when (or if ever) the credit will be available (potentially undermining the incentive). The Draft Bulletin should make clear that, notwithstanding that a cartel occurred the Bureau will carefully examine all aspects of a company's compliance program and assess whether the program met the seven basic requirements for a credible and effective compliance program as set out in the June 3, 2015 Draft Bulletin, including: (1) Management Commitment and Support; (2) Risk-based Corporate Compliance Assessment; (3) Corporate Compliance Policies and Procedures; (4) Compliance Training and Communication; (5) Monitoring, Verification and Reporting Mechanisms; (6) Consistent Disciplinary Procedures and Incentives for Compliance; and (7) Compliance Program Evaluation.

3. Impact of Procurement Integrity Regimes

Although not addressed directly in the Draft Bulletin, the Sections also wish to comment on the problematic impact of so-called “Integrity Regimes” on the Bureau’s Immunity and Leniency Programs, principally the federal (Canada) government’s policy in this regard.

By way of very brief background, the federal government’s Integrity Regime sets out the parameters within which suppliers and potential suppliers to the federal government may be debarred by Public Works and Government Services Canada (“**PWGSC**”) from participating in federal procurement processes because of participation (or even alleged participation) in certain proscribed conduct, including criminal offences under the *Competition Act*. Most importantly, suppliers are automatically ineligible to contract with the federal government for a prescribed period of time if they (or affiliates) are convicted of such offences. Until 2016, such a conviction meant an automatic suspension of 10 years. In 2016, another provision was introduced under the federal Integrity Regime for the negotiation of “administrative agreements” with the PWGSC whereby the term of ineligibility may be reduced to 5 years for parties that can demonstrate that they have cooperated with law enforcement authorities or have undertaken remedial actions to address the conduct that resulted in ineligibility. In addition, and apart from automatic suspension upon conviction, parties can also be suspended for 18 months even if only charged with relevant offences or if they otherwise “admitted guilt” to such offences but were not yet charged or convicted. The same rules also apply to suppliers convicted or charged with similar offences in a jurisdiction other than Canada.

In the view of the Sections, the threat of debarment under the Integrity Regime is a material disincentive to cooperation under the Bureau’s Immunity and Leniency Programs in cases where parties do business with the federal government. The key concern is with the automatic suspension for conviction of committing a criminal offence under the *Competition Act*, which makes no exception for leniency applicants who are required to plead guilty as part of their cooperation with the Bureau and DPP under the Immunity and Leniency Programs. This means that, in addition to penalties under the *Competition Act* and the inevitable prospect of civil litigation, prospective cooperating parties may also be facing automatic debarment from federal procurement opportunities, from anywhere from 5 to 10 years in duration (depending on whether an administrative agreement can be negotiated). It goes without saying that the potential for such automatic debarment would be a significant factor weighing against cooperation with the Bureau and DPP in certain cases.

Nor is the problem necessarily limited to leniency applicants. As mentioned, the PWGSC also acquired the authority in 2016 to suspend parties for 18 months if they “admit guilt” to a criminal offence under the *Competition Act*. Although successful immunity applicants under the Immunity Program are not convicted of offences (and thus are not subject to automatic debarment), they are obviously required under the Immunity Program to outline their participation in illegal conduct as part of their cooperation with the Bureau and DPP. There is thus a real concern that this could qualify as an admission of guilt for the purposes of the Integrity Regime and provide grounds for suspension by the PWGSC.²

² The Sections acknowledge that the Bureau entered into a Memorandum of Understanding (“**MOU**”) in 2013 with the PWGSC which states that the PWGSC will not disqualify from future bidding any party that has been granted immunity under the Bureau’s Immunity and Leniency Program. However, this MOU was entered into in 2013, three years before the PWGSC acquired its power of temporary suspensions. It is thus unclear if the MOU also applies to preclude the PWGSC from applying this suspension authority to immunity applicants for *Competition Act* offences.

The Sections understand that the Bureau is aware of the negative implications of the Integrity Regime for its Immunity and Leniency Programs. As such, the Sections encourage the Bureau to re-engage with the PWGSC with a view to negotiating a new MOU to address these issues. In particular, the Sections urge the PWGSC to either (i) exclude the *Competition Act* from application of the Integrity Regime entirely, or (ii) apply the Regime flexibly so that debarment is not an automatic or necessary result (whether for the full 10 years or the lower term of 5 years). In other words, parties should be given the opportunity to submit why debarment is inappropriate or at least why only a shorter term of suspension should be required. The Sections also urge the Bureau, the DPP and the PWGSC to re-affirm that the Integrity Regime does not apply to immunity applicants, including the PWGSC's authority to temporarily suspend suppliers for "admissions of guilt".

4. Prohibition Orders

Paragraph 192 of the Draft Bulletin states that the Bureau and/or the DPP will ordinarily require a leniency applicant to formalize its cooperation obligation in the plea agreement by consenting to a prohibition order under section 34 of the *Competition Act*. The prohibition order will be entered into court at the same time as the plea.

It is unclear if the Bureau's and/or the DPP's intention is that the terms of the prohibition order will be limited to the prescriptive obligation of continued cooperation or whether it will also contain the standard prohibition against future contraventions of the relevant provision of the *Competition Act*. Regardless, the Sections are of the view that imposing a prohibition order of any kind on leniency applicants is unnecessary, unfair and counterproductive to the goal of encouraging cooperation in criminal matters.

First, the Bureau and the DPP offer no explanation as to why the obligation of cooperation in the plea agreement must be further backstopped by a prohibition order. The Sections are unaware of any persistent issues of non-compliance by leniency applicants in this regard. Moreover, given that legitimate issues surrounding the scope and timing of cooperation can arise in different circumstances, it seems particularly draconian to have leniency applicants subject to potential criminal proceedings if there are disagreements with the Bureau/DPP in this area. It is far preferable to allow the parties to work out any such issues between themselves than inject the threat of criminal contempt into the equation.

The Sections also believe that any policy of imposing prohibition orders on leniency applicants is unfair because it would violate the fundamental principle that the Bureau's Immunity and Leniency Programs must place leniency applicants in a better position vis a vis parties that do not voluntarily come forward to cooperate. In this instance, however, the blanket imposition of prohibition orders on leniency applicants would put them in no better position than non-cooperating parties, and indeed could put them in an even worse position if the Bureau and/or DPP proceeds to criminalize issues affecting the scope and extent of their cooperation obligations. It would seem odd that, having come forward willingly to acknowledge their past illegal conduct and to provide the Bureau with valuable cooperation, leniency applicants could find themselves at risk of being criminally prosecuted on grounds that would not affect non-cooperating parties.

Finally, the Bureau's and/or the DPP's insistence on prohibition orders would be counterproductive because, for the reasons cited above, it would constitute yet another reason for prospective leniency applicants to legitimately question the relative benefits of participating in the Immunity and Leniency Program versus non-cooperation. Accordingly, in order to preserve

the attractiveness (and thus effectiveness of the Program), the Sections recommend against adopting a policy of imposing prohibition orders on leniency applicants.

5. Recidivism Disqualification for Leniency

Proposed paragraph 80 provides:

An IGI can be granted to a business organization or an individual. Where the applicant is a recidivist then the DPP may assess whether granting immunity to the applicant is in the public interest before issuing the IGI.

The goal of the program should be to encourage to the fullest extent voluntary cooperation and reporting of competition violations. Creating uncertainty about whether or not immunity may be granted based upon an applicant's prior actions may cause a company to forego reporting. As a result, illicit conduct may never be discovered. Given the choice between an entity reporting proscribed conduct or being discouraged from doing so because of doubts about whether leniency may be granted, the overwhelming public interest is in reporting the conduct. For this reason, it should be made clear that recidivism will not be a bar to leniency. The experience of authorities with well-established leniency programs, including the United States and the European Union, has been to encourage reporting even by entities which have previously engaged in competition violations by making immunity available despite that past history.

There are several practical reasons why this should be so, and recidivist activity should not be viewed in black and white terms in the context of a leniency application. First, competition violations may arise even within a company which has vigorous compliance programs in place. It would not serve any public interest if such a company refrained from coming forward because it had previously engaged in proscribed conduct. Second, an entity may put a compliance program in place after having discovered competition violations, sometimes as a result of agreements with regulators. The implementation of vigorous compliance policies may lead to the discovery of additional instances of competition violations. Once again, no public interest would be served if the entity were discouraged from coming forward due to the qualified nature of an IGI.

6. Comments Regarding Specific Paragraphs

Paragraph 24(b): We reiterate that paragraph 24(b) would benefit from an enhanced description of what is meant by the Bureau's statement regarding "sufficient evidence to warrant a referral of the matter" to the DPP.

Paragraph 28: The condition that the disclosed conduct be supported by credible and reliable evidence brings an element of uncertainty which might discourage applicants to come forward as they will not know how to evaluate these two conditions.

Paragraph 81: We recommend that paragraph 81 be brought into line with paragraphs 36 and 83 by replacing "may" by "will be eligible for coverage under the IGI". Dropping "may" provides greater certainty for individuals prepared to admit involvement in wrongdoing and are willing to cooperate in the government's investigation.

Paragraph 130: The Sections object to using indirect commerce as a means for calculating the "relevant volume of commerce." The Bureau recognizes the difficulty in

pursuing indirect sales and in practice does not do so (both in cases involving primarily indirect sales into Canada and cases involving both direct and indirect sales), apparently as a matter of policy. At the very least then, para 130 should say that although the Bureau generally will not include an applicant's indirect sales into Canada for the purpose of determining the relevant volume of commerce, if it decides to do so, such sales will be limited to the volume of commerce related to the value of the relevant input into the end product sold in Canada. Using indirect commerce for sentencing purposes will unduly prolong the negotiation and sentencing process and has the high likelihood of injecting uncertainty into the process and may lead to fines being imposed on the same commerce in multiple jurisdictions in international cartel cases.

Paragraph 138: This paragraph needs to be clarified regarding the methodology to calculate the fine when data is unavailable. This paragraph invites uncertainty and a lack of predictability in calculating an expected fine.

Paragraph 159: The timeline described in this paragraph seems rigid and as currently drafted does not appear to allow for individualized circumstantial departures. (See also Paragraph 164 for similar timing concerns.)

Paragraph 177: this paragraph introduces the concept of "a key witness" of second and subsequent leniency applicants and indicates that such a witness will "be eligible to be included in a plea agreement". Does such "inclusion" mean that the key witness will not be subject to separate prosecution? If so, this should be clarified. Further, who makes the decision on who is designated a "key witness", the party or the Bureau? The paragraph also suggests there can only be one "key witness" per party. This seems arbitrary. What if more than one witness provides the Bureau with information of equal value, or if two witnesses have very different information about a complex business and without the testimony of both, the Bureau would be missing a key aspect of the conduct in issue? In the latter example, are both witnesses not "key"?

Paragraph 187: The Sections recognize that each of the Bureau and the DPP must reach independent decisions with respect to leniency determinations. However, the Sections recommend that the Bureau and the DPP clarify that divergent views on leniency will be rare. Moreover, the Sections recommend that the DPP participate in the development of the leniency application and in the confirming interviews such that it has first-hand knowledge of the quality of the cooperation. That will help provide comfort to the applicant that the DPP will not reach a contrary conclusion with respect to the final granting of leniency.

Paragraph 193: The term "critically" needs to be clarified by the Bureau.

Paragraph 199: This paragraph indicates that at Step 5: Full disclosure, the Bureau will want to interview witnesses. The interviews of witnesses will already have taken place pursuant to paragraphs 176 and 177. Does this mean that the witnesses will be re-interviewed? And, the Sections do not believe that is appropriate or necessary that witness interviews be under oath and video recorded. We do not understand why the Bureau or the DPP would want more statements from witnesses that would be used by trial defendants for cross-examination purposes in the ordinary course. Most global prosecutors use "under oath" testimony in advance of trial in rare circumstances. We are not aware of any jurisdictions that video record pre-trial witness statements, unless there

are very rare extenuating circumstances. Finally, the consequences of Paragraph 203 should be sufficient in nearly all circumstances to guarantee full and truthful cooperation.

Paragraph 207: We recommend that the content of the footnote be included in the paragraph to avoid any misinterpretation as to which documents will be available to the public.

7. Comments on Appendices

We note an improvement from the Consultation Paper in Appendix 2 with respect to the “topics to be covered in a proffer.” Simply put, the Sections commend the Bureau and DPP for changing “will” to “may” in this sentence, “Topics to be covered in a proffer **may** include those set out below.” We note, however, that the topics are exhaustive and may be unnecessary to cover at some stages of the immunity and leniency process, but as long as there is flexibility in what an interview may cover, the Sections believe that Appendix 2 now works better for all.

As for the model letters, the Sections have reviewed them but we recommend that the Bureau and the DPP double-check the language of the letters against the Draft Bulletin’s specific provisions. Our specific comments on the model letters:

- Description of “anti-competitive conduct”: the Sections recommend that a narrow and limited description be used in the IGI or Leniency letters. The description needs to be appropriate and confirm the admission of wrongdoing, but a lengthy narrative would likely chill the applicant’s interest in getting the protection if the narrative will harm it or him/her in other proceedings in Canada and elsewhere.
- Use of cooperation information: The reference in the model letter to the Bureau’s and the DPP’s use of information provided by the applicant in the event that the applicant is thrown out of or ineligible for the Immunity or Leniency Programs may not be consistent with the terms of the Draft Bulletin.
- Confidentiality: Paragraphs 7-10 of the DPP Immunity Agreement for Companies differ slightly from the terms in the Draft Bulletin with respect to certain confidentiality provisions. For example, the Agreement introduces a “not unreasonably withheld” standard for applicant consent to DPP disclosures to third parties.
- Ineligibility: Paragraph 14(c) of the DPP Immunity Agreement for Companies introduces the concept that an individual may cause “[the Company] to be ineligible for immunity.” That is not explained in either the Agreement or the Draft Bulletin.