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Legal update

Competition Bureau's new "disclosure first" immunity and leniency programs take effect

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Antitrust and competition

On September 27 the Competition Bureau (the Bureau) and the Public Prosecution Service of Canada (PPSC) launched revised immunity and leniency programs in relation to investigating and prosecuting criminal offences under the *Competition Act*. The primary change is that prospective immunity and leniency applicants must fully disclose the facts and evidence relating to the violation, including documentary production and recorded witness testimony, **before** final immunity or leniency is granted.

Background and motivation

The immunity and leniency programs are intended to protect and incentivise whistleblowers – companies or individuals who bring anti-competitive conduct to the Competition Bureau's attention. The Bureau and the PPSC have historically relied heavily on information obtained from immunity and leniency applicants in investigations and prosecutions under the *Competition Act*.

The new policies reflect the Bureau's longstanding effort to introduce an interim immunity/leniency stage in the application process and therefore shift the granting of final immunity/leniency until after the applicant has completed its disclosures. The immunity and leniency programs have undergone a number of changes since first introduced in 2000 and 2010 respectively. Notably, the most recent changes bring back something resembling the "Preliminary Grant of Immunity" that existed prior to October 2007. In practice, the Bureau and PPSC have already been taking measures consistent with the shift towards earlier disclosure such as the use of "KGB Interviews" and "Queen/King for a Day" letters.[1]

Key changes to the programs

The most significant changes to the immunity and leniency programs include:

- the introduction of an interim immunity/leniency stage where the Bureau is able to obtain information from the applicant before making a final determination of whether to recommend immunity/leniency to the PPSC;

- the applicant's disclosures (including full document production and witness interviews) are now made at the front-end during the interim immunity/leniency stage. It is only after these disclosures are completed that final immunity/leniency may be extended. In contrast, the prior process was structured such that the applicant would complete the full disclosure process only after obtaining immunity/leniency;

- witness interviews during the full disclosure stage may be audio or video recorded and may be taken under oath;

- a recommendation for immunity will now only be made when the disclosed conduct constitutes an offence under the *Competition Act* and is supported by credible and reliable evidence that demonstrates all elements of the offence. Under the previous program, there was only an obligation to provide “any and all conduct of which it is aware, or becomes aware, that may constitute an offence” under the *Competition Act* and in which it may have been involved;

- all leniency applicants will be entitled to a cooperation credit of up to 50% off the base fine, depending on the value of their cooperation, regardless of the order in which they come forward. Under the previous program, the cooperation credit was set at 50% for the “first-in” leniency applicant, at 30% for the second-in applicant and was unspecified for subsequent applicants (but impliedly not greater than 30%);

- directors, officers and employees of a corporate immunity applicant or first-in leniency applicant are no longer guaranteed immunity but will need to demonstrate knowledge of the unlawful conduct and agree to cooperate with the Bureau; and

- final immunity will be granted only after the Bureau is satisfied it no longer needs the immunity applicant’s cooperation, potentially not until after a concluded prosecution and trial.

The proof will be in the participation

In a speech immediately before the public consultation process began, Interim Commissioner of Competition Matthew Boswell explained that introducing an interim immunity/leniency stage was “designed so that the Bureau will be provided with documents and access to witnesses faster than is often the case under the current program.” The revisions to the programs were motivated by a concern that the Bureau was not able to properly vet an immunity/leniency applicant based on the limited information provided under the prior program, which ultimately hindered the ability of the Bureau and the PPSC to bring “prosecution ready” cases to trial

It is an open question, however, as to how the revisions will impact the risk-benefit calculus for those considering participating in these programs. Various stakeholders raised concerns during the consultation process that certain revisions may discourage some companies from coming forward to participate. In particular, companies may be unwilling to face the substantial expense and business disruption of a full investigation and evidentiary production, together with the associated risk of collateral disclosure in related civil lawsuits and foreign proceedings, when there is no guarantee of immunity or leniency for the company or its officers and employees at the end of the process.

Ultimately, the decision to seek immunity/leniency is a complex one that will invariably depend on the circumstances facing a particular applicant. Regardless of whether the revisions to the immunity and leniency programs enhance the Bureau and PPSC’s ability to successfully prosecute cases, it remains to be seen whether these revisions might also result in fewer immunity/leniency applicants coming forward, and hence fewer cases to prosecute.

Danny Urquhart

Footnote

[1] Named for the Supreme Court of Canada case of *R v B (KG)*, [1993] 1 SCR 740, this process allows applicants to give interviews prior to immunity being extended with an assurance that any statements would not be used against them in any future prosecution.

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