

COOPERATING WITNESSES NOT CONFIDENTIAL INFORMERS - COMPETITION BUREAU UPDATES IMMUNITY AND LENIENCY PROGRAMS UNDER THE COMPETITION ACT

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Introduction

The Immunity and Leniency Programs under the *Competition Act*^[1] are powerful tools employed by the Competition Bureau and the Public Prosecution Service of Canada (“PPSC”) in the detection and prevention of criminal anti-competitive behaviour.^[2] The Bureau has described the Immunity Program as its “single most powerful means of detecting criminal activity”^[3] and has said the Programs are “unmatched”^[4] in their contributions toward effective enforcement.

On March 15, 2019, the Bureau and the PPSC updated the Programs to reflect the evolving legal and enforcement landscape.^[5] This bulletin discusses those updates, and a recent court decision that may have been a catalyst for the updates.

Background – The Act and the Programs

The purpose of the *Act* is to maintain and encourage competition in Canada in order to promote efficiency and adaptability of the Canadian economy.^[6] The *Act* prohibits various anti-competitive business activities such as conspiracies to fix prices, allocation of markets, bid rigging, and certain deceptive marketing practices. Violations of the *Act* can result in substantial fines and lengthy prison sentences.

The Bureau and the PPSC jointly administer the Programs in their effort to detect and prevent anti-competitive behavior prohibited by the *Act*.

Under the Immunity Program, a party involved in certain unlawful conduct that violates the *Act* may offer to cooperate with the Bureau in its investigation and request immunity from prosecution. An applicant must follow several steps in seeking a grant of immunity. Immunity is only available to the applicant in the following circumstances:

1. the Bureau is unaware of an offence, and the applicant is the first to disclose all elements of the offence;

or

2. the Bureau is aware of an offence, and the applicant is the first to come forward before the Bureau gathers sufficient evidence to warrant a referral of the matter to prosecution. [7]

Under the Leniency Program, a party involved in cartel activity may offer to cooperate with the Bureau in exchange for lenient treatment in sentencing. Like the Immunity Program, the applicant must follow several steps in seeking leniency. Unlike immunity, the applicant must plead guilty to the offence, and leniency is then granted in the recommended sentencing provided the applicant meets the requirements of the program.

A commonality to both the Immunity Program and the Leniency Program is that an applicant must provide “complete, timely and ongoing cooperation” at the applicant’s own expense, throughout the investigation into the illegal conduct and any subsequent prosecution.[8] It is this requirement of ongoing cooperation that gave rise to the recent updates to the Programs.

Updates to Immunity and Leniency Programs clarifies status of cooperating witnesses

According to the Bureau, the updates provide increased clarity on the status of participants in the Programs.[9] The updates explain that applicants who are granted leniency or immunity are cooperating witnesses, not confidential informers. Specifically, the updates are as follows:

1. The addition of paragraph 34(e), the expansion of paragraphs 54 and 159, and the addition of paragraph 206 all to clarify the confidentiality protections available to cooperating witnesses under the Programs and to confirm that cooperating witnesses are not confidential informers.
2. Updates to Appendix 3 (i.e., the model Grant of Interim Immunity letter) to reflect the above clarifications regarding the status of cooperating witnesses in the Immunity Program.

The distinction between a cooperating witness and a confidential informer is important, because confidential informer status confers rights not available to most witnesses in a criminal prosecution. Confidential informers are entitled to informer privilege, which imports a “near absolute bar on disclosure of identity”[10] and results in certain heightened obligations owing to the witness by the PPSC during any prosecution.

A response to recent Ontario Superior Court of Justice jurisprudence

The updates appear to be a response to a recent Ontario Superior Court of Justice[11] ruling in the “bread price-fixing”[12] case. Although an in-depth analysis of the Court’s decision is beyond the scope of this bulletin, the Court in that case ordered that two cooperating witnesses were confidential informers. To the casual observer the decision may not seem problematic; however, the granting of confidential informer status is at odds with a cooperating witness’s ongoing commitment of cooperation. The agreement to grant immunity is reciprocal - the cooperating witness is required to “fully support” the investigation and prosecution in exchange for

immunity. As the preface of the Bureau's 2010 Bulletin describing the Immunity Program explained,

Immunity is an extraordinary grant by the Crown to forego prosecution and a no less formidable commitment by the applicant to address illegal wrongdoing and to fully support the Competition Bureau and the Crown in investigating and prosecuting others implicated in the illegal activity.

In deciding that the cooperating witnesses ought to be afforded confidential informer status, the Court embarked upon a detailed analysis of informer privilege as well as the Immunity Program (as described in the Bureau's 2010 Bulletin^[13]), and concluded,

... the common law privilege is in no way challenged or diminished by the Immunity Program. Rather, it is complemented by the Program that is a more finely calibrated response to a specific genre of criminal law enforcement in the economic-regulatory field.^[14]

The Court went on to reason that informer privilege attaches to cooperating witnesses in immunity cases but "if the case goes to trial, the [witnesses] have waived the privilege by agreeing to testify."^[15] The Court reached this conclusion on the rationale that "an informer under the Immunity Program is given the same protections as under the common law privilege except that when and, significantly if a trial occurs, their situations diverge."^[16]

The problems with the Court's reasoning are two-fold:

1. the confidentiality protections built into the Immunity Program have never been absolute or even near absolute; and
2. the granting of confidential informer status is at odds with the immunity/leniency witness's ongoing commitment of cooperation during the investigation and prosecution of the offense at issue.

It has always been a term of the immunity that a cooperating witness's identity may be disclosed by the Bureau or the PPSC in certain agreed circumstances. For example, when the Bureau is required to swear an information to obtain a search warrant^[17] or when disclosure is required pursuant to the Crown's disclosure^[18] obligations.^[19] By contrast, informer privilege is near absolute, and the informer must agree to waive that privilege before his or her identity can be disclosed.

The disclosure of the applicant's identity is sometimes critical during the investigation and prosecution stages. The Bureau's FAQs regarding the Programs highlights this point, "Typically, the identity of an Applicant will remain confidential until charges are laid against other participants to the offence and disclosure of the Crown's case to the accused is required." However,

...[the Applicant's] identity may be disclosed before charges are laid if the Bureau relies on their evidence

in an application to a Canadian court for a search warrant, production order or judicial authorization of another investigative measure. Recourse to search warrants and production orders, among other things, can be of utmost importance to an investigation. To obtain court authorizations, the Bureau must provide the court with information that there are reasonable grounds to believe that an offence has been, or will be, committed. The Bureau will rely on the information provided by the Applicant to establish these grounds.^[20]

Rather than a “compliment”, the granting of confidential informer status seems at odds with the immunity/leniency witness’s ongoing commitment of cooperation. Applicants under both Programs are advised early in the process that confidentiality is important but not absolute.

Takeaways

There is little doubt that cooperating witnesses ought to be afforded a high degree of confidentiality by the Bureau and the PPSC. However, providing witnesses with confidential informer status is at odds with the express provisions of the Programs and the basic premise of full cooperation by witnesses in the Programs. Ultimately, the updates to the Programs provide greater clarity regarding the status of cooperating witnesses, and will assist judicial decision-makers should future applications for confidential informer arise.

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[1] RSC, 1985, c C-34 (“Act”).

[2] Government of Canada, Competition Bureau Canada, Bulletin, [Immunity and Leniency Programs under the Competition Act](#) (March 15, 2019), (“March 2019 Bulletin”).

[3] Government of Canada, Competition Bureau Canada, Bulletin, [Archived – Immunity Program under the Competition Act](#) (June 7, 2010), (“2010 Bulletin”).

[4] March 2019 Bulletin.

[5] March 2019 Bulletin.

[6] *Competition Act*, s 1.1.

[7] March 2019 Bulletin.

[8] March 2019 Bulletin, paras 41, 154.

[9] March 2019 Bulletin.

[10] Re Application by Immunity Applicant Witnesses at First Stage Hearing, 2018 ONSC 63016301 (“Application by Immunity Applicant”) at para 7.

[11] Application by Immunity Applicant.

[12] Click [here](#).

[13] See above 2010 Bulletin.

[14] Application by Immunity Applicant at para 111.

[15] Application by Immunity Applicant at para 112.

[16] Application by Immunity Applicant at para 109.

[17] See e.g., 2010 Bulletin 31(b).

[18] See e.g., R. v. Stinchcombe, [1991] 3 S.C.R. 326

[19] See e.g. 2010 Bulletin 31(a).

[20] Government of Canada, Competition Bureau Canada, [*Immunity program: Frequently Asked Questions*](#) (date modified: 2018-02-14).

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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