

Canada: cartels and leniency

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Canada's Immunity Programme, formally released by the Competition Bureau in September 2000, has been a highly effective enforcement tool, encouraging early disclosure of competition offences that may otherwise be difficult to detect, such as international cartels. Under the programme, immunity from prosecution is available to the first party to disclose evidence of criminal anti-competitive activity of which the Bureau was either not aware or may not be in a position to effectively prosecute without cooperation from a participant in the illegal conduct. In practice over the past five years, the procedures and considerations employed by the Bureau under the programme closely resemble those of the US Amnesty Programme.

In order to formalise the ad hoc procedures developed since the programme's inception in 2000, the Bureau has recently revised its written policy and continues consultation on the issues most commonly raised in an immunity application. It is anticipated that further changes to the policy will be released in the coming months.

Canada's cartel laws

Canada's cartel laws are similar to section 1 of the Sherman Act in the United States, with one key difference: there is no per se category of offences in Canada. In order to prove the offence, the authorities must demonstrate that the impugned activity either did, or, where the agreement was not implemented, would have, 'unduly' prevented or lessened competition. International cartel activity which unduly lessens competition in any market in Canada is proscribed by sections 45 and 46 of Canada's Competition Act. Subsection 45(1) states:

"Conspiracy – Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,*
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,*
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sales, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or*
- (d) to otherwise restrain or injure competition unduly, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both."*

The Supreme Court of Canada has held that an agreement to lessen competition unduly requires proof of the following two elements:

- a moderate degree of market power among the parties to the agreement, and
- behaviour that tends to reduce competition or limit entry in the relevant market.¹

It is not necessary that the agreement actually results in an undue lessening of competition, nor is it necessary that the parties to the

agreement intend to lessen competition unduly. The offence will be made out where the parties to the agreement intended to enter the agreement, which, if carried out, would likely result in the requisite undue lessening of competition. A conspiracy can be inferred from circumstantial evidence. Direct evidence of communications or an agreement between the parties is not necessary for the offence to be proved.

Under section 46 of the Act, a corporation carrying on business in Canada that implements a foreign conspiracy in Canada, regardless of whether it has knowledge of the foreign conspiracy, may be guilty of an indictable offence and subject to criminal penalties. Section 46 states:

"Foreign directives – Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court."

Foreign companies with no Canadian presence, which may have taken part in an international conspiracy not to sell into the Canadian market or with respect to prices in Canada, may also be pursued by the authorities for 'aiding and abetting' a section 46 offence.² In these cases, the attorney general of Canada, in the context of negotiated guilty pleas, has charged foreign companies with aiding and abetting an offence under section 46, rather than seeking to indict those companies directly under section 45. In other words, it is alleged that the foreign company aided and abetted a foreign competitor in directing the competitor's Canadian affiliate to implement a conspiracy entered into outside Canada.³ Neither the validity of section 46, nor whether it can be aided and abetted, has been determined by a Canadian court in a contested proceeding. In practice, most convictions under either section 45 or 46 are the result of negotiated plea agreements and statements of admissions.

The immunity programme

In Canada, immunity from prosecution is available for conduct that is contrary to the criminal provisions of the Act, including conspiracy. The Bureau investigates criminal conduct that is enforced in the courts by the attorney general of Canada through the Department of Justice (DoJ).

Canada's Immunity Programme is detailed in two documents published by the Bureau:

- an information bulletin released by the Bureau in September

2000 entitled ‘Immunity Program under the Competition Act’⁴ (the bulletin); and

- ‘Immunity Program – Answers to Frequently Asked Questions’⁵ (the FAQs), a supplement published by the Bureau and most recently revised in October 2005.

The sole authority to grant immunity to a party implicated in an offence under the Act lies with the attorney general through the DoJ. The role of the Bureau is to investigate potential violations under the Act and make recommendations to the attorney general as to whether immunity should be granted.

Conditions for grant of immunity

There are two situations where the Bureau may recommend that immunity be granted:

- where the Bureau is unaware of an offence in relation to a particular product or service and the party is the first to disclose it; and
- where the Bureau is aware of an offence and the party is the first to come forward, before there is sufficient evidence to warrant a referral of the matter to the attorney general.

Before a recommendation will be made, however, the Bureau must be satisfied that the applicant has met, or is prepared to meet, the following conditions:

- The applicant must have ceased its participation in the illegal activity.
- The applicant cannot have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada. It is important to note, however, that corporations or persons who were ‘co-leaders’ or ‘co-instigators’ of the illegal activity may still be eligible for immunity.
- During the Bureau’s investigation and subsequent prosecutions, the party must provide complete and timely cooperation, including:
 - all competition related offences with respect to the particular product or service in which it may have been involved. This includes the timely disclosure of any obstruction activities that may be revealed as a result of an applicant’s internal investigation
 - full, frank and truthful disclosure of all evidence and information within its possession or control, wherever located, relating to the offences. There must be no misrepresentation of any material facts and any such misrepresentations that have occurred in the past must be fully and promptly disclosed
 - full and continuing cooperation. Where the immunity applicant is a business, it must take all lawful measures at its own expense to ensure that all present and former affiliates, directors, officers and employees cooperate throughout all stages of the investigation. Provided these directors, officers and employees admit their participation as part of the corporate admission and provide complete and timely cooperation, they will qualify for the recommendation for immunity as well
 - where possible, restitution for the illegal activity. In practice, with the availability of civil damage actions, the restitution requirement for price fixing and market allocation conspiracies is a difficult factor to evaluate and has not been strictly applied

If all of these conditions are satisfied, the Bureau may recommend to the attorney general that immunity be granted or, where full immunity may not be available, the Bureau may recommend other forms of leniency. For example, an applicant’s cooperation may still be

considered as a mitigating factor in any plea arrangement negotiations or subsequent proceedings or in conjunction with immunity for disclosing illegal conduct with respect to another product or service (as discussed below). It is important to note, however, that immunity may be lost at any point in the process where the applicant has not met the above requirements. In this case, immunity may still be recommended for a second applicant who does meet all of the requirements.

It is important to note that the Bureau and the attorney general will not consider joint requests for immunity. Allowing a party to wait for, and coordinate with, a co-conspirator before contacting the Bureau would presumably undermine the rationale for, and effectiveness of, the immunity programme.

Steps to an immunity application

Obtaining a marker

The first step is initial contact with the Canadian authorities. Anyone may discuss or request immunity for cartel activity by contacting the deputy commissioner of competition, criminal matters. The cornerstone of the immunity programme is its ‘first-in’ policy whereby the first qualified party to make contact with the Canadian authorities (and who subsequently meets all of its cooperation requirements) will be the sole party who receives full immunity. Consequently, a potential applicant should always consider making an application for immunity as early as possible.

Initial contact generally takes the form of an anonymous inquiry by a party’s legal counsel as to whether immunity (first-in status) would be available in respect of a particular product or industry. Until October 2005, this was an ad hoc procedure that was not set out in a written policy. On 17 October 2005, the Bureau released revised FAQs adopting the ad hoc procedure for the first-in applicant. The FAQs clarify that only Bureau officials (and not the attorney general) may grant a first-in marker and that ‘no-names’ hypothetical information is adequate to request a marker. Once a marker has been requested, the Bureau then undertakes an internal check of its open investigations to determine whether a marker is available. The FAQs emphasise the importance of providing precise product and sub-product definitions to ensure that the Bureau can do a proper search of its immunity marker database. This is consistent with the practice followed in the United States.

Provisional guarantee of immunity

After the applicant has obtained a marker to reserve its first-in status, the second step is to obtain a provisional guarantee of immunity (PGI). The PGI normally covers all present and former directors, officers and employees and is granted on the condition that the applicant continues timely disclosure of all relevant information to the Bureau and DoJ and continue to meet all of the other requirements of the programme.

To obtain a PGI, the applicant must describe the illegal activity, usually (but not always) on the basis of an oral hypothetical proffer by an applicant’s legal counsel to the Bureau. A proffer must provide adequately detailed information about the key elements of the offence in order to permit the Bureau to recommend a PGI and for the attorney general to satisfy himself that an offence may have been committed and that the applicant was not the instigator or the sole beneficiary of the conduct in Canada. The revised FAQs set out the types of information the Bureau expects to receive in a proffer to describe the illegal activity, including:

- a description of the parties concerned in the conduct;
- the product and geographic markets affected;
- the time period of the illegal conduct;
- a description of the industry concerned, including pricing mechanisms and supply channels;

- a description of the conduct and any monitoring mechanisms used by participants;
- the effect of the conduct, including the volume of affected commerce and key Canadian customers;
- a general description of the witnesses and records available to assist the Bureau in its investigation; and
- whether and from which other international authorities leniency has been requested.

In Canada, unlike the United States, horizontal agreements among competitors are not per se illegal. The authorities must demonstrate that the agreement, if implemented, is likely to lead to an undue lessening of competition in the relevant market. The revised FAQs indicate that the Bureau does not expect an applicant to demonstrate decisively that an undue lessening has occurred at the proffer stage as a precondition to the Bureau recommending the grant of a PGI. The Bureau does expect an applicant to disclose adequate information to assess the potential anti-competitive effects, including information about market shares, barriers to entry, countervailing market power and cross-elasticity of demand.

The revised FAQs also state that applicants must deliver an oral or written proffer within 30 days from the date that a marker is requested (or as otherwise agreed with the Bureau). Where an applicant with a marker does not meet the 30-day (or otherwise agreed to) timeline for a proffer, the marker may be revoked. This new timeline has been criticised for being in conflict with the fundamental tenet of the immunity programme – that early disclosure is best. Most international cartel cases require a lengthy internal investigation to gather adequate information to meet the Bureau's expectations of the information required for a proffer. As a result, many have questioned whether the 30-day time period is realistic for these cases. In practice, the Bureau has permitted some flexibility with respect to the 30-day period in appropriate cases to ensure that reliable information is disclosed as soon as possible.

Full disclosure

The third step is negotiating an offer of immunity that is premised on full disclosure of all relevant information to the Bureau in exchange for a guarantee that the Bureau will not use the information against the applicant, unless the party breaches its obligations.

Full disclosure is an onerous obligation, premised on an exhaustive internal investigation and search for information that is relevant to the activity. Cooperation usually consists of numerous interviews of present and former directors, officers and employees and an exhaustive search for, and production of, relevant documents and records. The formal offer of immunity will establish the key terms and conditions upon which the grant will be dependant. Generally, the offer states that it is without prejudice to the applicant in the event that immunity is not granted and that the offer will be maintained in confidence.

During this stage, immunity applicants have an obligation to cooperate fully and to disclose all information related to offences under the Act with respect to the relevant product or service. This includes an obligation to use reasonable, lawful measures to encourage compliance by all present and former officers, directors, employees and affiliates. This may include paying for independent legal counsel for individuals or taking disciplinary action against individuals who refuse to cooperate.

The revised FAQs prescribe a six-month time period from the grant of a PGI, within which an applicant must complete its cooperation obligations under the programme, including document production. The six-month period can be difficult to meet in cases of complex international organisations where numerous sources of documents must be identified and reviewed before production can

begin. Going forward, it will be interesting to see how flexible the Bureau will be with respect to these timelines in order to accommodate the challenges that programme applicants may face to obtain the required information and documents.

Immunity

The fourth and final step is the execution of an immunity agreement. Following recommendation by the Bureau and independent review by the DoJ, the attorney general may, within his discretion, accept the recommendation and execute an immunity agreement that incorporates all continuing obligations. The immunity agreement is generally not completed until the Bureau's investigation of the alleged offence has been concluded.

Revocation of immunity

If a party fails to comply with any of the requirements of the immunity agreement, immunity may be revoked. Revocation has been, and will be, a rare event, reserved for the most egregious cases. The Bureau may resume investigation of any party that does not meet its obligations pursuant to the agreement and will consider referring the matter to the attorney general with the recommendation that the grant of immunity be revoked. Once immunity is revoked, action may then be taken against the party with regard to the illegal activity. The same holds true for a corporation that does not fully promote the complete and timely cooperation of its employees, as well as an applicant that does not disclose any or all competition-related offences or does not provide full, frank and truthful disclosure of all evidence and information known or available to it. In this respect, any obstruction activity must be strongly discouraged and, if detected, must be immediately reported to the authorities so as not to jeopardise the grant of immunity.

Although the revised FAQs codify the procedures used in the past and the information which the Bureau expects to receive, they do not add any more guidance on when the Bureau would consider recommending that a PGI or grant of full immunity be revoked. In a consultation paper released in February 2006,⁶ the Bureau sought comment on additional factors that may be considered when making the recommendation to the attorney general to revoke a grant of immunity. In particular, the Bureau has indicated that a company must take "all legal and reasonable steps" to cooperate. The number and significance of non-cooperating individuals will be considered when determining whether the company has failed to meet its obligation to be "full, frank and truthful". The consultation paper does not provide examples of what legal steps it expects to be taken to secure the cooperation of non-cooperating individuals. For many corporate applicants, finding an appropriate and effective legal basis in the jurisdiction in which the non-cooperating witness resides can be a challenge.

In addition, the consultation paper indicates that the Bureau would retain the information provided by an immunity applicant whose grant is revoked and use that information against the immunity applicant in any subsequent prosecution. The risk that all of the information provided in cooperating with the authorities could then be used against an immunity applicant is an important consideration for all applicants. It highlights the importance of ensuring that clear guidelines surrounding revocation are in place. Uncertainty surrounding exactly which measures are necessary to meet cooperation obligations, coupled with the risk that all the information provided could be used against someone in a subsequent prosecution, could affect an applicant's decision to apply for immunity in the first place. The risk of cooperating and having immunity revoked could be more severe than never having applied for immunity at all.

Immunity plus and penalty plus

Under immunity plus, where a party is not first in, that party may still obtain a reduced penalty if it is the first to disclose an occurrence of a second offence related to another product or service of which the Bureau was not originally aware. In this instance, the party will be eligible for full immunity for the second offence, as well as a favourable sentencing recommendation with respect to the punishment for the original offence, provided the party pleads guilty to the original offence. In practice, immunity plus (and amnesty plus in the US) has operated as a catalyst for the disclosure of conduct that has led to the opening of a number of other investigations in related products.

In the US, there is a corollary policy called ‘penalty plus’ under which an applicant who applies for amnesty for one offence and fails to disclose a second offence is subject to an increased penalty for the second offence. Although the Bureau does not have a stated penalty plus policy, in the consultation paper released in February, the Bureau signalled that it is considering the adoption of such a policy.⁷ At present, the Bureau deals with such a situation by considering whether to revoke the grant of immunity for the first offence and treating the non-disclosure of the second offence as an aggravating factor in sentencing with respect to the second offence.

Transnational criminal anti-competitive activity

In situations where the criminal anti-competitive activity is international, the relevant authorities may decide to pursue independent, joint or parallel investigations. For this reason, a party may decide to approach each authority separately. But the Bureau recommends that any applicant whose business activity has a substantial connection to Canada should consider contacting the Bureau either before, or immediately after, contacting foreign competition law authorities.⁸ The bulletin further highlights that a party who has been granted immunity or favourable treatment in another jurisdiction may not receive special consideration from the Bureau on that premise alone (and, in fact, it has occurred that a party who received immunity in another jurisdiction was not first-in and did not receive immunity in Canada). If possible, companies should consider seeking immunity in all jurisdictions affected by the relevant activity in a coordinated manner. A company may be placed in a difficult position if it is cooperating in one jurisdiction and defending against an investigation in another, especially where those jurisdictions have information sharing agreements. These agreements may have confidentiality exceptions for immunity applicants, but those matters must be carefully explored before proceeding.

Confidentiality

With regard to information provided to the Bureau during a request for immunity, the Bureau guarantees absolute confidentiality except where: (i) there has been public disclosure by the party; (ii) the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act; (iii) disclosure is required by law, ie, as required to those who are charged with a criminal offence; or (iv) disclosure is necessary to prevent the commission from committing a serious criminal offence. If a private action should arise pursuant to section 36 of the Act, the Bureau’s policy is to provide confidential documents and evidence only in response to a court order.

The FAQs address the question of whether the Bureau will disclose information provided by an immunity applicant to other enforcement agencies or to a foreign jurisdiction. The Bureau states that it will not share the identity of or the information provided by the immunity applicant to other enforcement agencies or a foreign agency, unless the immunity applicant has waived confidentiality. If an applicant does not have immunity, however, the Bureau will not agree to stipulations in plea agreements which limit information disclosure to other antitrust agencies. The rationale behind this is that Canada is party to international agreements that provide for mutual legal assistance among international antitrust enforcement agencies and failure to disclose information to such agencies would undermine Canada’s international obligations and limit the effectiveness of these agreements.

In addition, the FAQs indicate that the exceptions to the policy of non-disclosure of the identity of, or information obtained from, a programme applicant are under review. At present, the FAQs indicate that the Bureau will only consider disclosure where the information is otherwise made public, where the applicant consents and the information is necessary for enforcement of the Act, to prevent the commission from committing a serious criminal offence, or where otherwise required by law. In the consultation paper, the Bureau has indicated that a typical immunity applicant will remain a confidential informant until charges against other participants are laid, triggering Canada’s criminal disclosure law, which requires disclosure of the applicant’s identity.

Confidentiality of the identity of an immunity applicant and the information they provide to the Bureau during an investigation is increasingly becoming an issue in civil litigation claims and particularly parallel class actions in the US and Canada. Increasingly, plaintiffs in the US engaged in litigation concerning allegations of international cartels, for which there may be active investigations on both sides of the border, are seeking access to the Bureau’s investigative files through document requests. Although Canadian plaintiffs

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Global enforcement of competition laws and cooperation amongst enforcement agencies around the world has increased exponentially over the last decade. The consequences for those who are subject to these enforcement efforts can be severe. FMC lawyers have significant expertise in international cartel matters and have represented numerous clients in conspiracy investigations and prosecutions involving competition authorities in the United States and Europe, as well as the Canadian Competition Bureau. FMC lawyers also work effectively with clients and counsel in the US and EU on international and cross-border merger transactions.

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are generally not entitled to discovery until a class action is certified, Canadian plaintiffs are also seeking to gain access to US discovery by seeking standing in US class actions. The difference in privilege laws on either side of the border may lead to substantively different disclosure on either side of the border such that documents or information that may be subject to privilege in Canada may be subject to disclosure in US litigation. Confidentiality of an applicant's immunity status is also an ongoing issue for corporate immunity applicants as they grapple with increasingly stringent securities disclosure laws in a number of different jurisdictions. An immunity applicant's obligations under securities disclosure laws may be at odds with the Bureau's determination to maintain confidentiality in order to protect the integrity of its own ongoing investigation.

Notes

- 1 *Canada v Pharmaceutical Society* (Nova Scotia); [1992] 2 SCR 606 (SCC)
- 2 There is no specific 'aiding and abetting' offence set out in the Competition Act. But, section 21 of the Criminal Code of Canada, RSC 1985, c C-46 provides that it is a criminal offence to aid or abet any other person who commits a criminal offence.
- 3 See for example the indictment against Tokai Carbon Co, Ltd, 1 February 2001, Federal Court File number T-24-01, available online at www.strategis.ca.
- 4 Available online: www.competitionBureau.gc.ca
- 5 Available online: www.competitionBureau.gc.ca
- 6 Competition Bureau, 'Immunity Program Review Consultation Paper', February 2006. Available online: www.competitionBureau.gc.ca
- 7 Competition Bureau, 'Immunity Program Review Consultation Paper', February 2006. Available online: www.competitionBureau.gc.ca
- 8 Competition Bureau, FAQs, available online: www.competitionBureau.gc.ca