

# Canada

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## 1. Please give a brief overview of the legislation that allows a leniency programme, the authority that administers it, and the frequency of applications and grants.

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Canada operates a leniency programme for criminal offences under the Competition Act (Act). The terms and conditions of Canada's Immunity Program are set out in:

- The Immunity Program Under the Competition Act (Bulletin), an information bulletin released by the Competition Bureau (Bureau) in September 2000.
- Immunity Program - Frequently Asked Questions (FAQ Bulletin), a supplement to the Bulletin, which was revised in October 2005.

The Bureau is a government agency, which investigates criminal anti-competitive conduct that violates the Act (*see box, The administrator authority*). Violations are enforced in the courts by the Attorney General through the Department of Justice (DOJ).

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 Commissioner of Competition (Commissioner), who is the administrative head of the Bureau, determines whether the pre-requisites under the Immunity Program are met and makes a recommendation to the Attorney General. The Attorney General then considers whether it is in the public interest to grant immunity.

The Bureau and DOJ do not release immunity application statistics.

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## 2. What infringements of competition law are covered by the leniency programme?

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The Act contains both criminal and civil provisions, but immunity is only available for violations of the criminal provisions. Criminal offences in relation to competition include (*Part VI, Act*):

- Conspiracies that unduly lessen competition (such as price-fixing and market allocation).

- Bid-rigging.
- Price discrimination.
- Resale price maintenance.
- Predatory pricing.
- Certain deceptive marketing practices, including misleading representations, deceptive telemarketing or pyramid selling.

All of these are punishable by fines and/or imprisonment.

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## 3. Is leniency available to individuals (for example, managers and employees of an undertaking that has been granted leniency)?

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Officers, directors and employees of an undertaking can qualify for leniency either as part of the leniency granted to that undertaking or, if the undertaking does not qualify for immunity but the individual does, on an individual basis (*see Question 8, Proceedings against individuals*).

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## 4. Is full immunity from fines available? If so, to whom?

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Full immunity from fines (and imprisonment) is available to business entities and employees of those entities (including directors and officers) if they are the first to come forward and meet the required criteria (*see Question 9*).

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## 5. Is there a sliding scale of available leniency (for example, full immunity for the first to offer information and reduced leniency for those that subsequently provide additional information)?

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If full immunity is not available, the Bureau can recommend other forms of leniency. For example, an applicant's co-operation can 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 (Immunity Plus) (*see Question 7*).

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**6. What conditions must be met for leniency (for example, must the undertaking end its involvement with the infringement and co-operate fully with the authority)?**

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Where immunity is available, it is a provisional grant, conditional on full disclosure and co-operation by the party and, where applicable, its directors, officers and employees. Before a recommendation for provisional immunity is granted, the Bureau must be satisfied that the applicant has met, or is prepared to meet, the following conditions:

- The applicant ceases its participation in the illegal activity.
- The applicant did not solely instigate or lead the illegal activity and was not the sole beneficiary of the activity in Canada. Co-leaders or co-instigators of the illegal activity can still be eligible for immunity.
- Complete and timely co-operation is provided during the Bureau's investigation and subsequent prosecutions, including:
  - revealing all competition-related offences relating to the particular product or service in question. This includes the timely disclosure of any obstruction activities that may be revealed as a result of an applicant's internal investigation;
  - providing 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 which occurred in the past must be fully and promptly disclosed;
  - providing full and continuing co-operation. Applicants that are business entities must take all lawful measures, at their own expense, to ensure that all current and former affiliates, directors, officers and employees co-operate throughout all stages of the investigation. If directors, officers and employees admit their involvement as part of the corporate admission and provide complete and timely co-operation, they also qualify for provisional immunity;
  - where possible, making 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.

The provisional grant of immunity can be withdrawn at any point in the process if the applicant does not meet these requirements. In such a case, immunity can still be recommended for a second applicant that does meet all of the requirements.

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**7. Does the competition authority offer any reduction in fines for activities in one market if an undertaking is the first to disclose restrictive agreements and practices in a second market?**

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Immunity Plus is available. If a party is not the first to apply and qualify for immunity, it can still seek a reduced penalty for a first offence 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 is eligible for full immunity for the second offence, as well as a favourable sentencing recommendation in relation to the first offence, provided it pleads guilty to the first offence.

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**8. Is leniency or immunity available in relation to criminal prosecution? If so, please state:**

- **The circumstances in which leniency or immunity is available.**
- **Whether criminal proceedings can be brought against individuals in an undertaking that has been granted leniency or immunity.**
- **How employees' interests can be protected.**

■ **Circumstances.** Immunity is only available for conduct that is prohibited by the criminal provisions of the Act (*see Question 2*) if certain conditions are met (*see Question 6*).

■ **Proceedings against individuals.** If a business entity qualifies for immunity, all current directors, officers and employees qualify for the same recommendation for immunity if they both (*Bulletin*):

- admit their involvement in the illegal anti-competitive activity as part of the corporate admission;
- provide complete and timely co-operation.

Past directors, officers and employees who offer to co-operate with the Bureau's investigation may also qualify for immunity, but this is determined on a case-by-case basis (*Bulletin*).

In addition, if an entity fails to qualify for immunity, the past or present directors, officers and employees who come forward with the entity to co-operate can still be considered for immunity as if they had approached the Bureau individually.

■ **Employees' interests.** Employees' (including officers' and directors') interests can be protected under an entity's grant of immunity, provided that the individual admits his involvement and provides complete and timely co-operation.

If an individual is no longer employed by the entity, either:

- the entity can seek to have the employee protected under its grant of immunity;
- the former employee can seek immunity on his own.

In either case, it is advisable to ensure that the former employee, officer or director has a separate lawyer to represent his interests throughout the immunity process.

If a former employee, officer or director instigated the activity or tried to obstruct the investigation, immunity is available for the entity but may not apply to the individual. The individual can be "carved out" of the provisional immunity grant and prosecuted separately. If the individual is not resident in Canada, the DOJ can seek to have him extradited to Canada for prosecution under a mutual legal assistance treaty.

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**9. Under what circumstances will the competition authority consider an application for leniency (for example, only if, at the time of the application, the authority does not have enough evidence to initiate an investigation or prosecute of its own accord)?**

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Full immunity is only granted if the Bureau is:

- Not aware of an offence in relation to a particular product or service and the party is the first to disclose it; or
- 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; and
- Satisfied that the applicant has met, or is prepared to meet, the necessary conditions (see *Question 6*).

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**10. Is leniency available if the applicant coerced others to participate in the infringement?**

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To qualify for immunity, the applicant must not have instigated or led the illegal activity in Canada. Therefore, leniency is not available if the applicant, on its own, coerced others to participate in the infringement.

However, entities or individuals may still be eligible for immunity if they co-led or co-instigated the illegal activity (although joint applications are not permitted). Whether this would apply even if those entities jointly coerced a third party to participate in the infringement is not clear but is likely to depend on the circumstances. The Bureau has indicated that it will, along with the Attorney General, review and assess all facts obtained at the time the immunity is requested by the party and during the course of the investigation. For example, if evidence comes to light during an investigation that the applicant coerced or threatened another to participate in, or instigated, the activity, the applicant will not qualify for immunity.

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**11. Please set out how an application for leniency must be made. In particular:**

- **To which authority should an application be submitted?**
  - **What form of application is used?**
  - **What type of information or evidence are applicants expected to provide?**
  - **Are oral statements permitted?**
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■ **Relevant authority.** Anyone can discuss the possibility of, or request, immunity by contacting the:

- Senior Deputy Commissioner of Competition, Criminal Matters (for conspiracy, bid-rigging and offences related to pricing);
- Deputy Commissioner of Competition, Fair Business Practices (for deceptive marketing practices).

In the past, initial contact was often with the DOJ, but the Bureau has recently specified that it should now be as set out above.

- **Form of application.** Initial contact should be made orally. An applicant does not need to deliver a statement or documentary evidence of the illegal conduct before being considered for immunity. A potential applicant should always consider making an application for immunity as soon as possible because of the first-in policy (see *Question 9*). In practice, initial contact is generally made by an anonymous telephone inquiry by an applicant's lawyer as to whether immunity would be available for a particular product or industry. The Bureau then makes an internal check of its open investigations and, assuming immunity is available and no other parties have already qualified for full immunity, the lawyer can seek an immunity marker reserving the applicant's place as first to apply, while more information is obtained. This is consistent with the practice followed in the US.

The second step is to obtain a provisional guarantee of immunity (PGI). This usually covers all current 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 continues to meet all other requirements of the programme (see *Question 6*). An oral proffer (that is, an oral disclosure) or written proffer, setting out detailed information about the key elements of an offence and demonstrating that the applicant was not the instigator or sole beneficiary of the conduct in Canada (see *below, Oral statements*) is usually given by the applicant's lawyer on a hypothetical basis and must be provided within 30 days of approaching the Bureau for an immunity marker (or as otherwise agreed with the Bureau).

There may be a conflict between the recommendation that applicants come forward "as soon as they believe that they are implicated in an offence" (*Bulletin*) and the requirement to provide adequate information for the Bureau and the DOJ to be able to determine whether a PGI should be granted. For example, in the case of a market allocation conspiracy, it can be difficult or impossible for one party to provide information that establishes all elements of the offence, especially its effect on competition in the Canadian market (because of the requirement that it lessens competition unduly). It can be particularly difficult to establish all elements of the offence at the earliest stage of detection and an extensive internal investigation by a competition lawyer may be needed.

The third step involves negotiating an offer of immunity. This is based 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 can be an onerous obligation. Co-operation usually consists of many interviews with current and former directors, officers and employees and an exhaustive search for, and production of, documents, records and other information relevant to the activity. Reasonable lawful measures must be used to encourage all current and former officers, directors, employees and affiliates to comply (such as paying for an independent lawyer to represent them or taking disciplinary action against individuals who refuse to co-operate). The formal offer of immunity:

- establishes the key terms and conditions for its grant;
- usually states that it is without prejudice to the applicant in the event that immunity is not granted;
- usually guarantees that the offer will be maintained in confidence.

Finally, after a recommendation by the Bureau and independent review, the Attorney General can, at his discretion, execute an immunity agreement which incorporates all continuing obligations. This is not usually completed until the Bureau's investigation of the alleged offence has been concluded.

- **Information/evidence.** During the initial stages of an immunity application, an oral proffer setting out the key elements of the offence and required market information is adequate. This must be followed by full co-operation, including production of all relevant documents within six months of approaching the Bureau for a marker (such as travel records, price lists and transactional data regarding sales of the relevant product), and interviews with key witnesses as soon as they can be made available.
- **Oral statements.** To obtain a PGI, the applicant must describe the illegal activity, usually (but not always) on the basis of a hypothetical oral proffer given by its lawyer to the Bureau and the DOJ. A proffer (either oral or written) must

be provided within 30 days of approaching the Bureau for an immunity marker and provide detailed information about the key elements of the offence, including information about the parties, markets, industry, conduct and impact of the conduct involved. In addition, the applicant must disclose a general description of the witnesses and records available to it as evidence of the conduct and whether an immunity application has been, or is expected to be made, in other jurisdictions. A proffer does not need to include documentary evidence of the offence for the authorities to consider whether a PGI is available. This ensures that the authorities can consider whether they have adequate information to recommend provisional immunity while also protecting an applicant's immunity position.

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## 12. In what circumstances can leniency be withdrawn?

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The Bureau can resume an investigation and refer the matter to the Attorney General with the recommendation that the grant of immunity be revoked if:

- A party does not meet its obligations under an immunity agreement.
- A business entity does not fully promote the complete and timely co-operation of its employees.
- An applicant 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.

Action can then be taken against the party for the illegal activity.

Any activity that might breach conditions of immunity should be avoided and, if it occurs, should be reported to the authorities immediately so as not to jeopardise the grant of immunity.

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## 13. What is the scope of leniency protection (for example, does it apply only in so far as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where further evidence of infringement is collected by the authority)?

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A leniency applicant is granted immunity from any action taken in Canada in relation to a particular product or service irrespective of whether some of the information was collected during investigation by the authority (as it is assumed that sufficient information has been provided by the applicant as part of the co-operation requirements to qualify for leniency). If the Bureau or DOJ uncover information concerning a second infringement that was not subject to the grant of immunity and which was not disclosed under Immunity Plus (*see Question 7*), then the original grant of immunity provides no protection with respect to the investigation into the second product.

**14. In relation to confidentiality:**

- **Is the identity of a leniency applicant disclosed during an investigation or in a final decision?**
- **Is information provided by a leniency applicant passed on to other undertakings under investigation?**
- **Can a leniency applicant request confidentiality of its identity or information provided?**

- **Identity disclosure.** A grant of immunity is not usually publicly disclosed and the Bureau has indicated that it treats the identity of the immunity applicant and any information obtained from the immunity applicant as confidential. However, the Bureau occasionally issues press releases to accompany guilty pleas which identify the immunity recipient, presumably with the recipient's permission.
- **Information disclosure.** If another party is prosecuted based on information provided by an immunity applicant, the prosecuting authority has a positive duty to disclose to that party all relevant documents in its possession, including the immunity agreement (*Canadian Charter of Rights and Freedoms*). The Bureau may also disclose information if it has been publicly disclosed, the party consents or it is required by law. In addition, the Bureau can disclose the identity of, and information provided by, an immunity applicant to other enforcement agencies, provided that the applicant has given a waiver permitting this.
- **Confidentiality requests.** Although information can be disclosed to another party that is prosecuted (*see above, Information disclosure*), this rarely happens in practice as third parties frequently negotiate a guilty plea to avoid prosecution proceedings. Nevertheless, because of an accused party's due process rights, an immunity applicant cannot prevent disclosure if a prosecution actually takes place.

**15. Can statements made in support of leniency in foreign jurisdictions be made subject to discovery orders in your courts?**

Statements made and information provided to the authorities are generally subject to public interest privilege or settlement privilege, as well as to the confidentiality provisions of the Act. Statements made in support of leniency in foreign jurisdictions can be subject to discovery orders in Canada if they would not be protected by the law of privilege in either the originating jurisdiction or Canada. If the law of the originating jurisdiction does not protect from disclosure and the information sought is relevant to Canadian proceedings, it is not protected from disclosure under Canadian discovery rules.

**THE ADMINISTRATIVE AUTHORITY**

**Competition Bureau**

**Person/department to apply to.** For criminal deceptive marketing practices: Raymond Pierce (Deputy Commissioner, Fair Business Practices)

For criminal conduct, other than deceptive marketing practices (including price-fixing, market allocation, bid-rigging and price maintenance): Denyse MacKenzie (Senior Deputy Commissioner, Criminal Matters)

**Contact details.** 50 Victoria Street  
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**Procedure for obtaining application documents.** There is no form for application. Initial contacts are made orally (by telephone) and prospective applications can be discussed on an anonymous basis, usually through a lawyer (*see Question 11*).



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