

Canada



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REGULATION

1. Please give a brief overview of the legislation that allows a leniency programme, the authority that administers it and details of any published guidance.

Canada operates an immunity programme (called the Immunity Program) for the first party to disclose a criminal offence under the Competition Act (Act). The terms and conditions of the Immunity Program are set out in:

- The Immunity Program Under the Competition Act (Bulletin), an information bulletin released by the Competition Bureau (Bureau) in October 2007 (replacing a bulletin previously issued in September 2000).
- Immunity Program Responses to Frequently Asked Questions (FAQ Bulletin), a supplement to the Bulletin, most recently updated in October 2007.
- Adjustments to the Immunity Program Background Paper (Adjustments Paper), a publication outlining the Bureau's response to consultation submissions on changes to Canada's immunity program, published in October 2007.
- Certain documents published by the Director of Public Prosecutions of Canada (DPP), including immunity agreement templates.

The Bureau is a government agency that investigates criminal anti-competitive conduct that violates the Act (*see box, The regulatory authority*). The Attorney General, through the DPP, enforces criminal violations in the courts.

The sole authority to grant immunity to a party implicated in an offence under the Act lies with the DPP. The Commissioner of Competition (Commissioner), who is the administrative head of the Bureau, determines whether the Immunity Program conditions are met and makes a recommendation to the DPP. The DPP then considers whether it is in the public interest to grant immunity (*Bulletin*).

2. What infringements of competition law does the leniency programme cover?

Immunity is only available for criminal offences prohibited under Part VI of the Act. These include the following, each of which is punishable by fines and/or imprisonment:

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

- Bid-rigging.
- Price maintenance and other pricing offences.
- Certain deceptive marketing practices, including misleading representations, deceptive telemarketing or pyramid selling.

3. Please provide examples of notable recent cases in which the leniency programme has been applied.

Applications for immunity are confidential. They are only disclosed where disputed charges are brought against cartel participants in a case where the immunity applicant has provided evidence (*see Question 14, Identity disclosure*). The Bureau has stated that from 2000 to 2005, it received over 35 immunity applications relating to over 40 different products.

AVAILABILITY OF LENIENCY

4. Is full immunity from civil fines available and what conditions must be met for immunity to be granted?

Full immunity is only available to the first party to report criminal conduct prohibited by Part VI of the Act (*see Questions 2 and 7, Circumstances*). There is no immunity from civil or administrative orders or penalties.

5. Is there a sliding scale of available leniency from civil fines (for example, if full immunity is not available, are decreasing levels of leniency available for subsequent applicants)?

There is no immunity from civil or administrative orders or penalties. There is no formal leniency programme specifying decreasing levels of criminal fine reductions for subsequent applicants (although the Bureau has stated its intention to develop such a programme in the future) and in practice, leniency is regularly granted to later applicants (*Adjustments Paper*) (*see also Question 7, Circumstances*).

6. Is immunity or leniency for civil fines available to individuals (for example, managers and employees of an undertaking that has been granted immunity or leniency)? If so, what conditions apply?

Immunity for individuals is only available for criminal conduct (see *Question 7, Proceedings against individuals*).

7. Is immunity or leniency available for companies and/or individuals in relation to criminal prosecution? If so, please state:

- **The circumstances in which immunity or leniency from criminal prosecution is available.**
- **Whether criminal proceedings can be brought against individuals of an undertaking that has been granted immunity or leniency (whether from civil fines or criminal prosecution).**
- **How employees' interests can be protected when a company applies for leniency.**

- **Circumstances.** Immunity is only available to the first party to disclose criminal conduct under Part VI of the Act. For immunity to be available, the Bureau must either be unaware of the conduct, or have insufficient evidence to refer the conduct to the DPP for prosecution (*Bulletin*).

Where immunity is available, it is granted conditional to the applicant providing full disclosure and co-operation and, where applicable, its directors, officers and employees. This is a single-step conditional process (*Adjustments Paper*).

Before a recommendation for 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 must not have coerced others to take part in the illegal activity (this replaces a previous requirement that the applicant had not led or instigated the activity) (*Adjustments Paper*);
- the applicant is not the only party to the activity;
- complete and timely co-operation is provided during the Bureau's investigation and subsequent prosecutions, including:
 - non-disclosure of an application for a marker (see *Question 9, Markers*) or subsequent immunity grant (unless required to by law, in which case consultation with the Bureau and the DPP is required);
 - providing details to the Bureau and DPP of any and all conduct of which the applicant is aware, or becomes aware, that may constitute an offence

under the Act and in which it may have been involved;

- providing full, complete, frank and truthful disclosure of all non-privileged information within its possession or available to it, wherever located, that in any manner relates to the anti-competitive conduct for which immunity is sought. There must be no misrepresentation of any material facts; and
- facilitating the ability of current and former directors, officers and employees and agents to appear for interviews and provide testimony.

Co-operation with the Bureau's investigation is at the applicant's own expense. Where immunity is not available, the Bureau may recommend other forms of leniency, although there is no formal leniency policy. An applicant's co-operation may be considered as a mitigating factor in any plea negotiations or subsequent proceedings. Immunity is available to both undertakings and individuals (see *below, Proceedings against individuals*).

- **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; and
- provide complete and timely co-operation.

Past directors, officers, employees or agents 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*).

Where a corporate applicant 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. An individual can apply for immunity even if the company has not made an application or is ineligible (*Bulletin*) (see *above, Circumstances*).

If a former employee, officer or director instigated the activity or tried to obstruct the investigation, continued the anti-competitive behaviour after an immunity marker has been requested, or failed to co-operate, immunity may be available for the entity but may not apply to the individual. If the individual is not present in Canada, the Department of Justice can seek to have the individual extradited to Canada for prosecution under an extradition treaty.

- **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 (see *above, Proceedings against individuals*).

If the entity no longer employs the individual, either the:

- entity can seek to have the employee protected under its grant of immunity; or

- former employee can seek immunity on his own (see above, *Proceedings against individuals*).

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.

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

As immunity is only available to the first applicant, a potential applicant should consider making an application for immunity as soon as possible after it becomes aware of its criminal conduct. Where other jurisdictions are involved, co-ordinating the approach to all relevant authorities is important to ensure that amnesty, immunity or leniency is available in as many relevant jurisdictions as possible.

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

- To which authority should an application be submitted?
- Who should make the application (for example, the company itself, its legal adviser or an individual employee)?
- Is it possible to obtain informal guidance on a confidential basis before submitting an application, to determine whether an undertaking will qualify for full immunity or leniency?
- What form of application is used?
- Can a marker be obtained to secure a certain level of leniency until all conditions can be met?
- What type of information or evidence are applicants expected to provide?
- Are oral statements accepted?
- Are short form applications in accordance with the European Competition network (ECN) Model Leniency Programme accepted?

- **Relevant authority.** Initial contact should be made to either 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).

(See box, *The regulatory authority*.)

- **Applicant.** Initial contact is generally made by the applicant's lawyer (see below, *Informal guidance*).

- **Informal guidance.** Initial contact for all applications is generally made by an anonymous telephone enquiry by an applicant's lawyer as to whether immunity is available for a particular product or industry. The applicant must provide a precise product definition (including any sub-products) to ensure no other party has applied for a marker for the same product (*FAQ Bulletin*). 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 (see below, *Markers*).

- **Form of application.** See above, *Informal guidance*.

- **Markers.** The applicant can obtain an immunity marker, reserving its place as the first to apply, while more information is obtained to either perfect the marker or withdraw it. This is a paperless process, and is consistent with the US practice.

- **Information/evidence.** After placing a marker, an applicant must provide the Bureau with a proffer, which describes in detail the illegal activity for which immunity is sought, along with its effect in Canada and supporting evidence. Proffers are typically hypothetical and are generally provided by the applicant's counsel (*FAQ Bulletin*). After considering the proffer, the Bureau makes a recommendation to the DPP as to whether the applicant should receive immunity (see *Question 10*).

The Bureau will need to know with sufficient detail and certainty (*Bulletin*):

- the nature of any records the applicant can provide;
- what evidence or testimony a potential witness can give; and
- how probative the evidence is likely to be.

A proffer should include (*FAQ Bulletin*):

- a description of the parties involved in the conduct;
- the physical and technical characteristics of the relevant product;
- a description of the industry involved, including pricing mechanisms and supply channels;
- a market definition, including the product and geographic markets affected;
- a description of the conduct, including the time period and monitoring and enforcement mechanisms (if any);
- the effect of the conduct, including the volume of affected commerce and pricing effects;
- a general description of the witnesses and records available to assist the Bureau in its investigation; and
- whether leniency has been or will be requested from other international authorities.

Immunity is granted on the basis that full disclosure will be provided of all relevant information to the Bureau. Full disclosure is an onerous obligation, involving an exhaustive internal investigation and search for information relevant to the activity. It 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.

- **Oral statements.** Request for markers and submission of proffers may be oral and based on hypothetical disclosure in the form of an anonymous enquiry, generally by an applicant's legal counsel (see above, *Informal guidance and Information/evidence* and below, *Question 10*).
- **Short form applications.** Not applicable.

10. Please set out the procedure and timetable.

For an applicant to obtain immunity the following steps must be undertaken:

- **First step: initial contact.** This is generally made by a party's lawyer on an oral, hypothetical basis to confirm whether immunity is available and to obtain a marker (see *Question 9, Informal guidance and Markers*).
- **Second step: proffer.** Within 30 days of requesting a marker (or as otherwise agreed with the Competition Bureau), the applicant must provide a proffer (see *Question 9, Information/evidence*). Once the proffer requirements are satisfied, the Bureau makes its recommendation to the DPP regarding the applicant's eligibility for immunity.
- **Third step: immunity agreement.** The DPP makes the final determination on whether an immunity agreement will be offered to the applicant. The DPP uses draft immunity agreement templates, which form the basis of all immunity agreements (*Adjustments Paper*). A previous policy under which a provisional guarantee of immunity was granted to applicants before a final agreement was executed has been replaced by a single final agreement, which remains conditional on appropriate co-operation from the applicant.
- **Final step: full disclosure and co-operation.** After entering into an immunity agreement with the DPP, full disclosure and co-operation with the investigation and any subsequent prosecution(s) is essential (*Bulletin*). Parties are required to co-operate fully on the understanding that the Bureau will not use the information against the applicant, unless the party fails to comply with the immunity agreement.

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants (for example, could full immunity become available again)?

The DPP may revoke a party's immunity if that party fails to comply with any of the terms and conditions that form part of the immunity agreement, on giving the party 14 days' written notice

(*Bulletin*). The Bureau discusses any deficiencies in an applicant's co-operation with the terms and conditions of the immunity agreement before making any recommendation to the DPP that immunity be revoked (*Adjustments Paper*). Specific deficiencies that may lead to a revocation of immunity include, but are not limited to:

- A party does not meet its obligations under the immunity agreement (such as active and full co-operation).
- The applicant intentionally fails to disclose all offences under the Act (unintentional non-disclosure may lead to increased penalties, but is not grounds for a revocation of immunity) (*Adjustments Paper*).
- A business entity does not use all lawful measures to secure the co-operation of current or past directors, officers, employees and agents.

Immunity may be selectively revoked for parties failing to meet their obligations under the immunity agreement. For example, a company's immunity may be revoked while its co-operative employees remain covered (*Adjustments Paper*). If immunity is revoked, 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. If immunity is revoked, a second applicant may be granted immunity.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted (for example, does it apply only insofar as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where the authority collects further evidence of infringement)?

The scope of immunity protection is explicitly set out in the immunity agreement between the applicant and the DPP. It will usually provide that a party is only granted immunity for offences:

- That it discloses to the Bureau.
- Which meet the criteria for criminal offences under the Act.

Immunity usually only lasts for the period of time during which illegal conduct occurred and was disclosed to the Bureau.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

Leniency plus (known as immunity plus in Canada) 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.

CONFIDENTIALITY AND DISCLOSURE

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 anonymity or confidentiality of information provided?**
-
- **Identity disclosure.** A grant of immunity is not publicly disclosed. Where another party is prosecuted in a contested proceeding based on information provided by an immunity applicant, the prosecuting authority has a positive duty under the Canadian Charter of Rights and Freedoms to disclose to that party all relevant documents in its possession, including the immunity agreement and therefore the identity of the applicant. However, the identity of an immunity applicant is not usually made public. This is because most cases are resolved through plea-bargaining negotiations before formal charges are brought and disclosure requirements triggered.
 - **Information disclosure.** See above, *Identity disclosure*.
 - **Confidentiality requests.** The Bureau guarantees confidentiality except where:
 - the applicant has made public disclosure or agreed to disclosure being made by the Bureau;
 - disclosure is required by law (for example, for those who have been charged with a criminal offence (see above, *Identity disclosure*));
 - disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
 - disclosure is necessary to prevent the commission of a serious criminal offence; or
 - disclosure is for the purpose of the administration or enforcement of the Act. Although this appears to be a potentially broad exception to confidentiality, in practice the Bureau has an interest in protecting confidentiality of immunity applicants and a situation where confidentiality was breached on this basis does not appear to have taken place.

Where a private action for damages for anti-competitive conduct is brought under section 36 of the Act, the Bureau only provides confidential documents and evidence when required to do so by a court order (*Bulletin*).

THE REGULATORY AUTHORITY

Competition Bureau (Bureau)

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Responsibilities. The Bureau investigates the reported criminal anti-competitive conduct and makes recommendations to the Director of Public Prosecutions on whether immunity from prosecution ought to be granted.

Person/department to apply to. For criminal deceptive marketing practices: Andrea Rosen (Acting 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).

Procedure for obtaining application documents. There is no official application form. Initial contacts are made orally (by telephone) and prospective applications can be discussed on an anonymous basis, usually through a lawyer (see *Question 9, Informal guidance*).

The Bureau will not share information provided by an applicant with foreign law enforcement agencies without the applicant's express waiver (*Adjustments Paper*) (see *Question 16*).

15. In relation to statements made in support of a leniency application:

- **Can information submitted in your jurisdiction be made subject to discovery orders in the domestic courts?**
 - **Can information submitted in your jurisdiction be made subject to discovery orders in foreign courts?**
 - **Can information submitted in foreign jurisdictions be made subject to discovery orders in the domestic courts?**
-
- **Domestic submissions and domestic discovery.** Statements 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.

- **Domestic submissions and foreign discovery.** No documents related to the negotiation of immunity in Canada have as yet been produced in a foreign jurisdiction. However, US litigants have sought production of other submissions to the Bureau, including plea negotiations. As far as can be determined from the limited case law, the privilege that would protect all such documents from disclosure in Canadian litigation does not appear to apply to the same degree under US law. So far, the Bureau has attempted to resist disclosure, and has indicated that it would resist disclosure of documents related to an immunity application if that were to be sought. However, there are examples of foreign courts ordering the production of submissions to the Bureau (*for example, Re Vitamins Antitrust Litigation, 2002 US Dist LEXIS 25815 (DDC)*).
- **Foreign submissions and domestic discovery.** 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 statements are protected under the law of the originating jurisdiction, the Canadian court decides whether to recognise such a privilege in Canada. The degree to which a court orders production is governed by principles of comity. If the law of the originating jurisdiction does not protect the statements from disclosure and the information sought is relevant to Canadian proceedings, it is not protected from disclosure under Canadian discovery rules.

INTER-AGENCY CO-OPERATION

16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?


Canada is party to international agreements that provide for mutual legal assistance among international anti-trust enforcement agencies. The Bureau routinely obtains confidentiality waivers from immunity applicants, to allow information sharing with such agencies (information sharing is otherwise prohibited (*see Question 14, Confidentiality requests*)).

Without a waiver, the Bureau will not share the identity of or information provided by an immunity applicant (*FAQ Bulletin*). However, if an applicant does not have immunity, the Bureau does not generally agree to provisions in plea-bargaining agreements that limit information disclosure to other anti-trust agencies.

PROPOSALS FOR REFORM

17. Please summarise any proposals for reform.

In February 2006, the Bureau released a consultation paper seeking public comment on several aspects of the Immunity Program. After extensive commentary from interested parties, the Bureau released revised immunity programme guidelines in October 2007 (*see Question 1*). So far, these revised guidelines have been well received by the practising bar, and additional reforms are not expected in the near future.



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