

Competition Bureau Information Bulletin

Immunity Program under the *Competition Act*

October 2007

Preface

The Competition Bureau's goal in creating and maintaining its Immunity Program (the Program) is to uncover and stop criminal anti-competitive activity prohibited by the *Competition Act* (the Act) and to deter others from engaging in similar behaviour. 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 (the Bureau) and the Crown in investigating and prosecuting others implicated in the illegal activity. Predictability and transparency in Bureau policy and practice ensures that an applicant appreciates the nature of immunity.

This Program has proven to be the Bureau's single most powerful means of detecting criminal activity. Its contribution to effective enforcement is unmatched. Its continued appeal to those who would otherwise remain undercover is pivotal to our enforcement efforts. Regular reviews and adjustments are essential to ensure that the Program keeps pace with changes that affect its ability to continue delivering significant value to the Bureau in terms of detection, investigation and prosecution of criminal behaviour.

Sheridan Scott
Commissioner of Competition

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A. INTRODUCTION

1. The *Competition Act* (the Act)¹ is a law of general application that establishes basic principles for the conduct of business in Canada. The Act maintains and encourages competition:

- to promote the efficiency and adaptability of the Canadian economy;
- to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada;
- to ensure small and medium-sized enterprises have equal opportunity to participate in the Canadian economy; and
- to provide consumers with competitive prices and product choices.

2. The Commissioner of Competition (the Commissioner) has the independent authority to administer and enforce the Act. The Commissioner is the head of the Competition Bureau (the Bureau), the organization that carries out investigations under the Act.

3. The Act contains criminal provisions² that prohibit anti-competitive business activities. These include conspiracies that prevent or lessen competition unduly (e.g., price fixing or market allocation agreements), bid-rigging, price maintenance and false or misleading representations. There are also civil provisions relating to mergers, abuse of dominant position and false or misleading representations. The criminal provisions of the Act underline the particular harm caused by certain anti-competitive behaviour. For example, the conspiracy provision carries a maximum fine of \$10 million and five years in prison.

4. The Bureau's objective in investigating and seeking penalties to address anti-competitive behaviour is to stop criminal acts and to deter companies and individuals from engaging in similar activity in the future. The Bureau also encourages companies to establish effective corporate compliance programs with a view to ensuring that their business practices conform to the law. The Bureau's *Corporate Compliance Programs Bulletin* provides advice to business organizations in an effort to promote lawful conduct.

5. The Bureau, like other law enforcement agencies, recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes. This Bulletin details the Bureau's approach to recommending immunity for violations of the Act for companies and individuals that co-operate in the investigation and prosecution of offences.

¹ *Competition Act*, R.S.C. 185, c. C-34.

² See Appendix I for relevant provisions.

6. This Bulletin describes the roles and responsibilities of the Commissioner and the Director of Public Prosecutions of Canada³ (DPP), the requirements an applicant must meet to obtain immunity, the impact of corporate immunity on directors, officers, employees and agents, the steps in the immunity process and the impact of failure to comply with the requirements of an immunity agreement. It addresses timing issues, including those that may arise in the context of international criminal activity and multi-jurisdictional investigations, and sets out the confidentiality assurances that the Bureau will make to an applicant.

7. The Bulletin expands upon and supersedes earlier bulletins and public statements by the Bureau. This Bulletin is further clarified in the “Responses to Frequently Asked Questions” (FAQs) document on the Bureau’s Web site and should be read together with that document for a complete picture of the Bureau’s approach to immunity. Neither the Bulletin nor the FAQs give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern.

8. For the purposes of this Bulletin, the term “party” means a business organization or an individual, as the case may be. The terms “business organization” and “company” are used interchangeably.

B. ROLES OF THE COMMISSIONER AND THE DPP

9. Criminal prosecutions under the Act are the responsibility of the DPP. It is the responsibility of the Bureau to investigate a matter that may engage the Act. Where there is evidence of an offence, the Commissioner may refer a matter to the DPP for consideration. The DPP has the sole authority to grant immunity to a party implicated in an offence under the Act on the basis of its own independent assessment of the public interest. The DPP’s policy on the granting of immunity is articulated in the *Federal Prosecution Service Deskbook*.⁴

³ The Public Prosecution Service of Canada (PPSC) was created by the *Director of Public Prosecutions Act* on December 12, 2006, when Part 3 of the *Federal Accountability Act* came into force. Its mandate is to initiate and conduct prosecutions under federal jurisdiction and to intervene in cases affecting prosecutions and investigations. The PPSC is independent of the Department of Justice Canada and reports to Parliament through the Attorney General. The head of the PPSC is the Director of Public Prosecutions.

⁴ *Federal Prosecution Service Deskbook*, Part VII, Chapter 35: Immunity Agreements, available online at <http://www.justice.gc.ca/en/dept/pub/fps/fpd/>.

C. OBTAINING IMMUNITY

10. A party implicated in criminal anti-competitive activity that may violate the Act may offer to co-operate with the Bureau and request immunity. A company may, but does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf. The Bureau will evaluate each offer of co-operation separately.

11. In this Bulletin, the term “immunity” refers to a grant of full immunity from prosecution under the Act. Where a party does not qualify for immunity, but the party co-operates with the Bureau, the Bureau may recommend that the DPP grant some form of leniency.

12. The Bureau encourages parties seeking immunity to come forward as soon as they believe they are implicated in an offence. It is not necessary for a party to have assembled a complete record of the information required when first contact is made with the Bureau. As the application process progresses, and before immunity is granted, the Commissioner and the DPP will examine an applicant’s immunity request to ensure that it complies with Program requirements.

REQUIREMENTS

13. Subject to the requirements set out in paragraphs 14 through 18, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the DPP that immunity be granted to a party in the following situations:

- a) the Bureau is unaware of an offence, and the party is the first to disclose it; or
- b) 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 DPP.

14. The party must terminate its participation in the illegal activity.

15. The party must not have coerced others to be party to the illegal activity.

16. Where the party requesting immunity is the only party involved in the offence it will not be eligible for immunity.

17. Throughout the course of the Bureau’s investigation and subsequent prosecutions, the party must provide complete, timely and ongoing co-operation:

- a) unless made public by the Commissioner or the DPP, or as required by law, the party

shall not disclose its application for a marker⁵ and subsequent immunity, or any related information, to a third party without the consent of the Bureau or the DPP. Where disclosure is required by law, the party must give notice to and consult with the Bureau and the DPP on how to protect the interests of the investigation in light of the disclosure requirement. The party shall give this notice as soon as it becomes aware of the disclosure requirement;

b) the party must reveal to the Commissioner and the DPP any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the Act and in which it may have been involved;

c) the party must provide full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which immunity is sought. There must be no misrepresentation of any material facts;

d) companies must take all lawful measures to secure the co-operation of current directors, officers and employees for the duration of the investigation and any ensuing prosecutions. Companies must also take all lawful measures to secure the co-operation of former directors, officers and employees as well as current and former agents, where doing so will not jeopardize the investigation and where the company has the consent of the Bureau or the DPP, as set out in (a). Companies shall encourage such persons to voluntarily provide to the Commissioner and the DPP all of their non-privileged information, evidence and records, in their possession or under their control, wherever located, that in any manner relate to the anti-competitive conduct; and

e) companies must facilitate the ability of current and former directors, officers, employees and agents to appear for interviews and to provide testimony in judicial proceedings in connection with the anti-competitive conduct.

18. Parties must co-operate with the Bureau's investigation and any subsequent prosecution at their own expense.

19. If the first party to apply for immunity fails to meet the requirements above, a subsequent party that does meet the requirements may be recommended for immunity.

⁵ Reference paragraph 23, *infra*, for a description of the initial contact (marker) step of the immunity process.

D. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS, EMPLOYEES AND AGENTS

20. If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing co-operation, also qualify for the same recommendation for immunity. Former directors, officers and employees who offer to co-operate with the Bureau's investigation may qualify for immunity. However, the Bureau will make any such determination on a case-by-case basis.

21. Agents of a company that qualifies for immunity may be included in the same recommendation for immunity. The Bureau will make any such determination on a case-by-case basis. In any event, to qualify for immunity, an agent must at a minimum admit its involvement in the illegal anti-competitive activity and provide complete, timely and ongoing co-operation with the Bureau investigation and any subsequent prosecution.

22. If a company does not qualify for a recommendation for immunity, current or former directors, officers, employees or agents may nonetheless be considered for immunity as though they had approached the Bureau individually. To qualify, they will be required to admit their involvement in the illegal anti-competitive activity and provide complete, timely and ongoing co-operation with the Bureau's investigation and any subsequent prosecution.

E. THE IMMUNITY PROCESS

Step 1: Initial Contact (Marker)

23. Anyone may initiate a request for immunity by communicating with the Senior Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices, to discuss the possibility of receiving immunity from prosecution in connection with an offence under the Act. An applicant can make the first contact on the basis of a limited hypothetical disclosure that identifies the nature of the criminal offence it has committed in respect of a specified product with sufficient detail to secure a "marker" as first in line to request immunity. Typically the request to the Bureau for this marker is made by an applicant's legal representative.

Step 2: Proffer

24. If the party obtains a marker and decides to proceed with the immunity application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information

for the Bureau to determine whether it might qualify under Part C, above. This is known as a “proffer” and is usually made in hypothetical terms by the applicant’s legal representative. The Bureau will need to know with sufficient detail and certainty 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. The Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP grant immunity.

If the Bureau concludes that the party demonstrates its capacity to provide full co-operation and fully satisfy the requirements of Part C, it will present all relevant proffered information, together with a recommendation regarding the party’s eligibility under the Program, to the DPP. The DPP will exercise its independent discretion and determine whether to grant the party immunity from prosecution⁶.

Step 3: Immunity Agreement

25. Upon recommendation by the Bureau, and if, after an independent review, the DPP accepts the recommendation, the DPP will execute an immunity agreement that will include all ongoing obligations as described in paragraphs 14 through 18, above.

Step 4: Full Disclosure and Co-operation

26. After the party enters into an immunity agreement with the DPP, full disclosure and co-operation with the investigation and any ensuing prosecution is essential. Parties are required to provide the Bureau with all non-privileged information, evidence and records that in any manner relate to the anti-competitive conduct, as described in paragraph 17, above. Witnesses will be expected to attend Bureau offices to be interviewed and may be called upon to testify in court proceedings. The full disclosure process will be conducted with the understanding that the Bureau will not use the information against the party, unless the party fails to comply with its immunity agreement, as described in Part F.

F. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AGREEMENT

27. The DPP may revoke a party’s immunity, and take appropriate action against the party, if that party fails to comply with any of the terms and conditions under its immunity agreement. Where the DPP determines that a party has failed to fulfil the terms and conditions set out in its immunity agreement, the DPP will provide fourteen (14) days written notice to the party before revoking the immunity agreement. The DPP’s policy on immunity, including the approach it will

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Having regard to the immunity policy set out in the *Federal Prosecution Service Deskbook*, *supra*, note 4.

take when an agreement is breached, is set out in the *Federal Prosecution Service Deskbook*.⁷

G. INTERNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY

28. The timing of an approach to the Bureau can be critical to the options available to a potential immunity applicant. A party should appreciate that when the matter involves other countries, the Bureau may be aware of the matter as a result of a foreign investigation before an approach by a party to the offence.

29. In matters involving multiple jurisdictions, a party should consider approaching each jurisdiction's competition law authority, or the authority responsible for deceptive marketing practices, in an effort to secure its advantage under all applicable immunity programs. A party whose business activities have a substantial connection to Canada should contact the Bureau before, or immediately after, approaching foreign competition law authorities.

30. The Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.

H. CONFIDENTIALITY

31. The Bureau treats as confidential the identity of a party requesting immunity. The only exceptions to this policy are where:

- a) disclosure is required by law;
- b) disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- c) disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- d) the party has agreed to disclosure;
- e) there has been public disclosure by the party; or
- f) disclosure is necessary to prevent the commission of a serious criminal offence.

32. The Bureau treats as confidential information obtained from a party requesting immunity, subject only to the exceptions listed in paragraph 31 above, or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.

33. The Bureau will not disclose the identity of a party, or the information obtained from that party, to any foreign law enforcement agency without the consent of the party.

⁷ *Supra*, note 4.

34. The Bureau's policy with respect to private actions under section 36 of the Act is to provide confidential information only in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information, including by seeking protective court orders.

I. CONCLUSION

35. The Bureau encourages the public to take advantage of its policies and programs, which facilitate conformity with the provisions of the *Competition Act*.

36. Anyone wishing to apply under the Commissioner's Immunity Program may contact:

Senior Deputy Commissioner, Criminal Matters
(819) 997-1208,

OR

Deputy Commissioner, Fair Business Practices
(819) 997-1231.

For further information, including Responses to Frequently Asked Questions regarding the Program's application, please refer to the Bureau Web site (<http://competition.ic.gc.ca>) or contact the Bureau toll free at telephone number **1 800 348-5358**.

APPENDIX 1: CRIMINAL PROVISIONS OF THE *COMPETITION ACT*

Part VI of the *Competition Act* prohibits under criminal sanction specified trade practices, bid rigging, agreements or arrangements that lessen competition unduly, false or misleading representations and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 51 and section 61 (Table 1), are treated separately from the criminal false or misleading representations and deceptive marketing practices provisions found in sections 52 through 55.1 (Table 2).

TABLE 1: Provisions of the *Competition Act* handled by the Criminal Matters Branch
(Responsibility of the Senior Deputy Commissioner of Competition, Criminal Matters)

Section 45	Conspiracies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product.
Section 46	Conspiracies, combinations, agreements or arrangements that are implemented in Canada as a result of directives, instructions, intimations of policy or other communication from a person outside of Canada, in a position to direct or influence the policies of the corporation, for the purpose of giving effect to a conspiracy, and that, if entered into in Canada, would have been in contravention of section 45.
Section 47	Bid rigging, when two or more persons agree that one party will refrain from bidding in a call for tenders, or when there is collusion in the submission of bids, unless such actions are made known to the tendering authority.
Section 48	Conspiracies, combinations, agreements or arrangements that limit unreasonably the opportunities, terms or participation of a player or competitor in professional sports, or to limit unreasonably the opportunity to negotiate with or play for a professional team or club.
Section 49	Subject to a number of exceptions explained in section 49 (2), any agreement between two or more federal financial institutions with respect to interest rates or charges on deposits or loans, service charges to customers, kinds of services provided, or the person or classes of persons to whom a loan or other service will be provided or withheld.

Paragraph 50 (1)(a)	Knowingly engaging in a practice of discriminating against competitors of a purchaser of an article by granting a discount or other advantage to a purchaser that is not available to competitors purchasing articles of like quality and quantity.
Paragraph 50 (1)(b)	Engaging in a policy of selling products in any area of Canada at prices lower than those exacted elsewhere in Canada, when the effect or design is to lessen competition substantially or eliminate a competitor.
Paragraph 50 (1)(c)	Engaging in a policy of selling products at unreasonably low prices when the effect or design is to lessen competition substantially or eliminate a competitor.
Section 51	Granting to a purchaser an allowance for advertising or display purposes that is not offered on proportionate terms to competing purchasers.
Section 61	Attempting to influence upward or to discourage the reduction of the price at which another person supplies or advertises a product, or refusing to supply or otherwise discriminating against anyone because of that person's low pricing policy.
Subsection 61 (6)	Attempting to induce a supplier to refuse to supply a product to a particular person because of that person's low pricing policy.

TABLE 2: Provisions of the *Competition Act* handled by the Fair Business Practices Branch

(Responsibility of the Deputy Commissioner of Competition, Fair Business Practices)

<p>Paragraph 52 (1)(a)</p>	<p>Knowingly or recklessly making representations that are false or misleading in a material respect for the purpose of promoting a product or any business interest.</p>
<p>Section 52.1</p>	<p>While engaging in telemarketing (the practice of using interactive telephone communications for the purpose of promoting the supply of a product or any business interest):</p> <ul style="list-style-type: none"> • failing to disclose the identity of the person on whose behalf the communication is being made, the purpose of the communication and the nature of the product or business being promoted; • making a representation that is false or misleading in a material respect; • requiring any advance payment as a condition for receiving a prize that has been, or supposedly has been, won in a contest or game; • failing to provide adequate and fair disclosure of the value of the prizes and of any fact that materially affects the chances of winning; • offering a gift (or any product at less than fair market value) as an inducement to buy another product, without fairly disclosing the value of the gift; or • requiring payment in advance for any product offered at a price grossly in excess of its fair market value.
<p>Section 53</p>	<p>Sending or causing to be sent a document or notice if the document or notice gives the general impression that the recipient has won or will win a prize or other benefit, and if the recipient is also asked or given the option to pay money, incur a cost or do anything that will incur a cost. Knowingly or recklessly making representations that are false or misleading in a material respect for the purpose of promoting a product or any business interest. The act must be for the purpose of promoting a business interest or the supply or use of a product.</p>
<p>Section 54</p>	<p>Supplying a product at a price that exceeds the lowest of two or more prices that are clearly shown on the product, its container, wrapper or display mount or on any in-store advertisement. This provision does not actually prohibit the existence of two or more prices, but requires that the product be offered for sale at the lowest price depicted.</p>

Section 55	Making representations relating to compensation under a multilevel marketing plan without fair, reasonable and timely disclosure of compensation actually received (or likely to be received) by typical participants in the plan.
Section 55.1	<p>Establishing, operating, advertising or promoting a pyramid-selling scheme, which is defined as a multilevel marketing plan under which:</p> <ul style="list-style-type: none"> • a participant pays for the right to receive compensation for recruiting another participant; • a participant is required to purchase a specified amount of product (other than an amount bought at the seller's cost price for the purpose of facilitating sales); • a participant is supplied with an unreasonable amount of product; or • there is no right to return the product in saleable condition on reasonable terms, or the participant is not informed of the right to return the product.